

DOCKET

No. 86-1836-ASX
Status: GRANTED

Title: New York State Club Association, Inc., Appellant
v.
City of New York, et al.

Docketed:
May 15, 1987

Court: Court of Appeals of New York
Counsel for appellant: Mansfield, Alan
Counsel for appellee: Koerner, Leonard J.

NOTE: Notice of Appeal filed 5/11/87

Entry	Date	Note	Proceedings and Orders
1	May 15 1987	G	Statement as to jurisdiction filed.
3	Jun 16 1987		Order extending time to file response to jurisdictional statement until July 18, 1987.
4	Jun 17 1987		Brief amicus curiae of Conference of Private Organizations filed.
5	Jul 18 1987		Motion of appellees City of NY, et al. to dismiss or affirm filed.
6	Jul 22 1987		DISTRIBUTED. September 28, 1987
7	Aug 12 1987	X	Reply brief of appellant NY State Club Assn., et al. filed.
8	Oct 5 1987		PROBABLE JURISDICTION NOTED. *****
9	Nov 19 1987		Brief amicus curiae of Conference of Private Organizations filed.
10	Nov 19 1987		Brief amicus curiae of Club Managers Assn. of America filed.
11	Nov 19 1987		Joint appendix filed.
12	Nov 19 1987		Brief amici curiae of Francisca Club, et al. filed.
15	Nov 19 1987		Brief of appellant NY St. Club Assn., Inc. filed.
14	Nov 24 1987		Order extending time to file brief of appellee on the merits until January 6, 1988.
16	Dec 3 1987		Record filed.
17	Dec 30 1987		Order further extending time to file brief of appellee on the merits until January 13, 1988.
18	Jan 5 1988		SET FOR ARGUMENT. Tuesday, February 23, 1988. (1st case). (1 hour).
19	Jan 5 1988		CIRCULATED.
20	Jan 6 1988	G	Motion of Licensing Board of the City of Boston for leave to file a brief as amicus curiae filed.
21	Jan 6 1988	X	Brief amici curiae of Comm. on Civil Rights, etc., Assn of Bar of City of NY filed.
22	Jan 6 1988	X	Brief amicus curiae of Committees on Civil Rights and Sex and Law filed.
23	Jan 7 1988	X	Brief amici curiae of Anti-Defamation League of B'Nai B'rith, et al. filed.
24	Jan 13 1988	X	Brief amicus curiae of American Bar Association filed.
25	Jan 13 1988	X	Brief amici curiae of New York, et al. filed.
26	Jan 13 1988	X	Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed.
27	Jan 13 1988	X	Brief amici curiae of U.S. Conference of Mayors, et al. filed.
28	Jan 13 1988	X	Brief amicus curiae of City and County of San Francisco, CA filed.

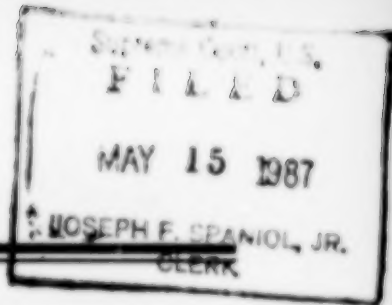
Entry	Date	Note	Proceedings and Orders
29	Jan 13 1988	X	Brief of appellees City of New York, et al. filed.
31	Jan 13 1988	G	Motion of NOW Legal Defense and Education Fund, et al. for leave to file a brief as amici curiae filed.
32	Jan 13 1988	X	Brief amici curiae of ACLU, et al. filed.
33	Jan 13 1988	X	Brief amicus curiae of City of Chicago filed.
34	Jan 13 1988	X	Brief amici curiae of City of Los Angeles, et al. filed.
30	Jan 19 1988		Motion of Licensing Board of the City of Boston for leave to file a brief as amicus curiae GRANTED.
35	Feb 12 1988	X	Reply brief of appellant NY St. Club Assn., Inc. filed.
36	Feb 22 1988		Motion of NOW Legal Defense and Education Fund, et al. for leave to file a brief as amici curiae GRANTED.
37	Feb 23 1988		ARGUED.

JURISDICTIONAL

STATEMENT

86 1836 ①

No. 86 -



IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

NEW YORK STATE CLUB ASSOCIATION, INC.,
Appellant,
v.

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF
NEW YORK, THE CITY HUMAN RIGHTS COMMISSION AND
THE MEMBERS OF THE CITY HUMAN RIGHTS COMMISSION,
Appellees.

**Appeal From the Court of Appeals
Of the State of New York**

JURISDICTIONAL STATEMENT

ALAN MANSFIELD
Counsel of Record
ANGELO T. COMETA
LOUIS J. LEFKOWITZ
DEBRA A. ROTH
40 West 57th Street
New York, NY 10019
(212) 977-9700

Attorneys for Appellant

May 15, 1987

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QUESTIONS PRESENTED

This appeal presents the following questions under the United States Constitution:

1. Whether Local Law 63 violates constitutional rights of freedom of association, speech and privacy because it (a) creates an irrebuttable presumption that any club which has 400 members, regularly serves meals and regularly receives income from or on behalf of nonmembers in furtherance of trade or business is not a private club, notwithstanding the fact that its size, purpose, selectivity and exclusion of others from critical aspects of the relationship entitles it to constitutional protection, and (b) is impermissibly overbroad and therefore chills the associational, privacy and speech rights of private clubs formed for primarily political, religious, or other expressive purposes?

2. Whether Local Law 63 violates the equal protection clause because it applies to selective private clubs, yet excludes similarly-situated benevolent organizations and religious corporations?

PARTIES

All parties are listed in the caption of this Jurisdictional Statement.*

* Appellant New York State Club Association, Inc., has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1

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OPINIONS BELOW

The unreported opinion of the Supreme Court of the State of New York, New York County was issued on October 28, 1985 and is printed in the Appendix at pages 25a-40a. The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department is reported at 118 A.D.2d 392, 505 N.Y.S.2d 152 (1st Dep't 1986) and is printed in the Appendix at pages 16a-22a. The opinion of the Court of Appeals of the State of New York, which affirmed the order of the Appellate Division, was issued on February 17, 1987, is reported at 69 N.Y.2d 211, 513 N.Y.S.2d 349, 505 N.E.2d 915 (1987) and is printed in the Appendix at pages 2a-13a.

JURISDICTIONAL GROUNDS

This is an appeal from the February 17, 1987 opinion and order of the Court of Appeals of the State of New York, which affirmed a final judgment of the Supreme Court of the State of New York, New York County upholding New York City Local Law 63 against NYSCA's federal constitutional challenges. Appellant's Notice of Appeal, printed in the Appendix at pages 41a-44a, was filed in the Court of Appeals of the State of New York on May 11, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). This appeal is being docketed in this Court within 90 days of the denial of NYSCA's claims in the Court of Appeals.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This direct appeal involves the first and fourteenth amendments to the United States Constitution, and Administrative Code, of the City of New York, Title 8 §§ 8-101 *et seq.*, which are set forth verbatim in pertinent part in the Appendix at 45a-46a.

HOW THE FEDERAL QUESTIONS WERE RAISED

NYSCA filed its complaint which sought a declaratory judgment that Local Law 63 was unconstitutional on the grounds that it violated NYSCA's members' rights of association, privacy and speech and was impermissibly overbroad under the first and fourteenth amendments and that it violated the equal protection guarantees of the fourteenth amendment. In its October 28, 1985 decision resolving cross-motions for summary judgment, the Supreme Court of the State of New York, New York County, by Acting Supreme Court Justice Grossman, explicitly addressed each of NYSCA's federal constitutional challenges and declared Local Law 63 to be constitutional. Upon direct appeals, both the Appellate Division of the Supreme Court of the State of New York and the Court of Appeals of the State of New York rejected each of NYSCA's federal constitutional claims.

STATEMENT OF THE CASE

A. The Parties

Appellant NYSCA is an association of 125 private clubs and associations in the State of New York, a substantial number of which are located in the City of New York. According to Gale's Encyclopedia of Associations (14th ed. 1980), more than 600,000 people in New York State are members of formal organizations which limit their membership on grounds of race, religion, sex or national origin.

Appellees are the City of New York, the Mayor of the City of New York, the City Human Rights Commission and the members of the City Human Rights Commission (collectively "the City"). The City Human Rights Commission is responsible for the enforcement of Local Law 63.

B. The Proceedings

Federal, New York State and City of New York legislatures long ago enacted civil rights laws for the laudable purpose of combatting discrimination in places of public accommodation. Pursuant to these laws, discriminatory practices in places of public accommodation such as hotels, bars, restaurants, movie theatres and the like (all of which are open to the public and most of which are operated for profit) are prohibited. See, e.g., Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(e) (1976); Human Rights Law, N.Y. Executive Law §§ 290 *et seq.* (McKinney 1982); City Commission on Human Rights, Administrative Code, Title 8 §§ 8-101 *et seq.* All three statutory schemes, however, expressly exclude private organizations from the definition of "place of public accommodation."¹ See, e.g., 42 U.S.C. § 2000a(e); N.Y. Executive Law § 292 (McKinney 1982) ("distinctly private organizations" exempted); Civil Rights Law § 40 (McKinney 1976) (same); Administrative Code Title 8 § 8-102(9) (same).

On October 24, 1984 the City amended Title 8 of the Administrative Code by enacting Local Law 63 and thereby radically altered the definition of a "distinctly private" organization. The City's amendment automatically deprives all private clubs of the "distinctly private" exclusion if they:

- (a) have more than 400 members;
- (b) provide regular meal service; and
- (c) regularly receive payment [regardless of amount] for dues, fees, use of space, facilities, services, meals or beverages, directly or indirectly from or

¹ Public accommodations laws have been enacted in 37 states; 17 states specifically mention and exempt private clubs. Note, *Discrimination in Private Social Clubs: Freedom of Association and Right to Privacy*, 1970 Duke L.J. 1181 n.3, 1182 n.5.

on behalf of a nonmember for furtherance of trade or business.

The amendment, however, expressly exempts corporations incorporated pursuant to the benevolent orders and religious corporations laws.²

The City's amendment established the irrebuttable presumption that a club which meets the tripartite test is prohibited from proving that it is covered by the "distinctly private" exclusion to the definition of a "place of public accommodation." Local Law 63 precludes a club from demonstrating that, as a result of its size, purpose, selectivity and the exclusion of others from critical aspects of the relationship, it is "distinctly private" under the analysis set forth by the Court in *Board of Directors of Rotary International v. Rotary Club of Duarte*, — U.S. —, 55 U.S.L.W. 4606 (U.S. May 4, 1987) ("Rotary"). See also *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) ("Roberts"). Nothing in Local Law 63 requires a club, before it is irrebuttably deemed to be not distinctly private, to have a substantial impact on trade or commerce;³ nor does the amendment require that a substantial

² Subsequent to the initiation of NYSCA's lawsuit, the City enacted rules and regulations purportedly aimed at correcting some of the amendment's imprecision. New York City Commission on Human Rights, Regulations: Unlawful Discriminatory Practices in Institutions, Clubs or Places of Accommodation Which Are Not Distinctly Private, ¶¶ 1 et seq. ("¶ —"). Thus the regulations seek to define such terms as "member," "regularly" and "for furtherance of trade or business." For example, "regular meal service" is defined as "the provision, either directly or under contract with another person, of breakfast, lunch or dinner on three or more days per week during two or more weeks per month during six or more months per year." ¶1(f). These regulations are relevant to NYSCA's appeal because in evaluating a challenge to a state law, the Court must consider any limiting construction that a state court or enforcement agency has proffered. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982).

³ The regulations define "regularly receives payment" to mean the

portion of the club's income derive from direct or indirect payment by nonmembers for furtherance of trade or business.⁴

Immediately after the enactment of Local Law 63, NYSCA initiated this action against the City. NYSCA challenged Local Law 63 as violating its constituent club members' constitutional rights of freedom of association, privacy and speech, as guaranteed by the first and fourteenth amendments to the federal constitution, as well as violating the equal protection guarantees of the fourteenth amendment.⁵ Appendix at 25a, 17a, 11a. NYSCA also challenged Local Law 63 as being impermissibly overbroad.

After cross-motions for summary judgment raising only constitutional issues, by an order and judgment dated October 28, 1985, Appendix at 23a-24a, the trial court declared Local Law 63 to be constitutional. Appendix at 40a.

receipt of as many payments during the course of a year as the number of weeks the club is available for use by members or nonmembers. ¶1(g).

⁴ A payment "for furtherance of trade or business" is defined in the regulations as payment on behalf of a trade or business organization, payment made from an account used primarily for business purposes or other payment made in connection with an individual's trade or business, including entertaining friends who may be business associates or clients. ¶1(d).

⁵ In the record below, NYSCA established that its members steadfastly adhere to exacting standards in their admissions policies, governance and the administration of their facilities. Appendix at 9a. Further, it is undisputed that NYSCA's constituent members have been organized to provide a comfortable and congenial atmosphere to engage in political, academic, social and/or recreational interchange with one another. Appendix at 12a. In addition, the record demonstrated that the facilities, services and, in some circumstances, dining rooms of these clubs are available solely to club members and *bona fide* guests, that the clubs are operated on a non-profit basis for the pleasure of their membership and that their publicity is not directed at the public at large. Affidavit of Walter S. de la Plante, President of NYSCA, sworn to on April 5, 1985.

and judgment to the Appellate Division of the Supreme Court, First Department. By an opinion and order dated July 31, 1986, a majority panel, relying on the trial court's decision, affirmed. Appendix at 14a, 22a. In a dissenting opinion, however, one justice concluded that Local Law 63 violated NYSCA's members' rights to equal protection of the laws because the Local Law exempted similarly-situated benevolent orders and religious corporations from its reach. Appendix at 20a.

On February 17, 1987, the Court of Appeals affirmed the opinion and order of the Appellate Division, finding that Local Law 63 did not abridge NYSCA's members' constitutional rights of association, privacy and speech. Appendix at 1a, 13a.

REASONS WHY THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This appeal presents to the Court the very question expressly left open in *Rotary*. The Court stated: "[W]e have no occasion in this case to consider the extent to which the First Amendment protects the right of individuals to associate in the many clubs and other entities with selective membership that are found throughout the country." *Rotary*, 55 U.S.L.W. at 4609, n.6. In *Rotary*, the Court analyzed the size, purpose, selectivity and exclusivity of a large international service organization, and determined that its decision to exclude women from membership was not entitled to constitutional protection. This appeal presents a substantial federal question, and is the first occasion for the Court to address these issues in the context of selective membership clubs.

A primary issue presented on this appeal is whether the City's elimination of the exclusion of NYSCA's distinctly private membership from the City's anti-discrimination law, by means of an irrebuttable presumption which precludes clubs from proving their private status, has impermissibly

abrogated the associational, privacy and speech rights of members of private organizations in the City of New York. The Court has established that, "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). See also *Roberts*, 468 U.S. at 623. While the eradication of discrimination from places that are truly public accommodations may well be a compelling state interest, the means adopted by the City via Local Law 63 to achieve that interest cannot be sustained. Indeed, as one lower court judge who considered NYSCA's constitutional challenge observed: "The stated objective of Local Law [63] is to open up clubs and organizations where business deals are made to minorities and women. It is not readily apparent that the means adopted in the local law will achieve that objective." *New York State Club Ass'n, Inc. v. City of New York*, Index No. 25028/84, slip op. at 9 (Sup. Ct. N.Y. Co. Nov. 8, 1984). By employing an irrebuttable presumption which infringes upon the associational, privacy and speech rights of NYSCA's members, the Local Law is not sufficiently narrowly drawn. Accordingly, Local Law 63 is unconstitutional.

Local Law 63, however, is not an isolated legislative event. Indeed, other jurisdictions have monitored this litigation with keen interest, and are currently considering the enactment of counterparts to the Local Law if its tripartite test withstands constitutional challenge.⁶

⁶ Among the municipalities which have considered or are considering legislation similar to Local Law 63 are: Detroit (Ordinance amending Ch. 27, Art. 1 of the Code of the City of Detroit); District of Columbia (Bill to amend Section 102(x) of the Human Rights Act of the District of Columbia (D.C. Law 2-38; D.C. Code § 1-2502(24))); Los Angeles (Motion proposing adoption of legislation by the City of Los Angeles dated February 24, 1987); and Philadelphia (Bill No. 835 amending Chapter 9-1100 of the Philadelphia Code entitled "Fair Practices").

NYSCA submits that the irrebuttable presumption and irrational three-pronged test of Local Law 63, and the proliferation of analogous local legislation and bills, present a wholesale attack on the associational, privacy and speech rights of private club members. Such defective legislation adopts a fundamentally misguided and constitutionally infirm standard that is simply at odds with the realities of American social life and the nature of private clubs. Thousands of organizations throughout the country have intentionally organized themselves along racial, ethnic, gender, national origin or religious lines for a variety of political, charitable, cultural, social or athletic reasons. These social organizations spring from a deeply felt need people have to "belong" and be among friends. If such organizations are compelled to admit members without regard to these factors, the camaraderie and sense of belonging which the associations were formed to foster and enhance will be lost, and the plurality and diversity, indeed, the quality, of American life will suffer.

Alexis de Tocqueville succinctly described the fundamental importance of the right of association and the danger of governmental interference with that right:

The most natural privilege of man next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and acting in common with them. The right of association therefore appears to be as almost inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.

A. de Tocqueville, *Democracy in America*, at 196 (Bradley ed. 1954). See also Craven, *Personhood: The Right To Be Let Alone*, 1976 Duke L.J. 699 ("The right to be let alone is the only nonpolitical protection for that vast array of human activities which, considered separately, may seem trivial, but together make up what most individuals think

of as freedom." (footnote omitted)). The importance of these issues warrants that the Court should note jurisdiction and order full briefs on the merits and oral argument.

I. LOCAL LAW 63 VIOLATES NYSCA'S MEMBERS' RIGHTS OF FREEDOM OF ASSOCIATION, PRIVACY AND SPEECH BECAUSE IT CREATES AN IRREBUTTABLE PRESUMPTION THAT MEMBERSHIP ORGANIZATIONS WHICH MEET THE TRIPARTITE TEST ARE NOT DISTINCTLY PRIVATE.

In *Rotary* and *Jaycees*, the Court held that private associations enjoyed constitutional protection from state intrusion based upon their rights of intimate and expressive association. Local Law 63's irrebuttable presumption, however, violates NYSCA's members' rights under both analyses and is therefore unconstitutional. It is also unconstitutional because it is impermissibly overbroad.

A. Intimate Association

In *Rotary*, the Court "recognized that the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights." 55 U.S.L.W. at 4608. And in *Roberts*, the Court acknowledged that "certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs," by fostering "diversity" and acting "as critical buffers between the individual and the power of the State." 468 U.S. at 618-19. "[P]rotecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." 468 U.S. at 619.

The right of intimate association affirmed in *Roberts* and elaborated upon in *Rotary* draws much of its force from the right of privacy. Indeed, the individual's right of privacy, in essence "the right to be let alone," has been hailed

by Justice Brandeis as "[t]he most comprehensive of rights and the right most valued by civilized men," *Olmstead v. United States*, 277 U.S. 438, 478 (1928). The Court has expressly recognized that this individual right of privacy extends to groups as the right of association. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

The principle that private associations enjoy constitutional protection was echoed by Justices Douglas and Marshall in *Moose Lodge No. 107 v. Irvis*:

My view of the First Amendment and the related guarantees of the Bill of Rights is that they create a zone of privacy which precludes government from interfering with private clubs or groups. The associational rights which our system honors permit all white, all black, all brown and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires. So the fact that the Moose Lodge allows only Caucasians to join or come as guests is constitutionally irrelevant, as is the decision of the Black Muslims to admit to their services only members of their race.

407 U.S. 163, 179-80 (1972) (dissenting on other grounds) (emphasis added), quoted in *Gilmore v. City of Montgomery, Alabama*, 417 U.S. 556, 575 (1974). See also *Evans v. Newton*, 382 U.S. 296, 298 (1966).

In seeking to define the class of relationships whose rights are protected because they are "intimate" or "private," the Court in *Rotary* stated that "[s]uch relationships may take various forms, including the most intimate We have not attempted to mark the precise boundaries of this type of constitutional protection Of course, we have not held that constitutional protection is restricted

to relationships among family members." 55 U.S.L.W. at 4608 (citation omitted). The Court described the type of relationships entitled to such first amendment protection as presupposing "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctly personal aspects of one's life." 55 U.S.L.W. at 4608, quoting *Roberts*, 468 U.S. at 619-20. The Court also affirmed the principle that "[d]etermining the limits of state authority over an individual's freedom to enter into a particular association . . . unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." 55 U.S.L.W. at 4608, quoting *Roberts*, 468 U.S. at 620. "In determining whether a particular association is sufficiently personal or private to warrant constitutional protection, we consider factors such as size, purpose, selectivity and whether others are excluded from critical aspects of the relationship." 55 U.S.L.W. at 4608. Indeed, selectivity has often been described as the hallmark of a private club. See, e.g., *Kiwanis International v. Ridgewood Kiwanis Club*, 806 F.2d 468, 473 (3d Cir. 1986), petition for cert. filed, 55 U.S.L.W. — (U.S. May 11, 1987); *Brown v. Loudoun Golf & Country Club, Inc.*, 573 F. Supp. 399, 403 (E.D. Va. 1983); *United States v. Trustees of Fraternal Order of Eagles, Milwaukee Aerie No. 137*, 472 F. Supp. 1174, 1175 (E.D. Wis. 1979); *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1203 (D. Conn. 1974).

Applying the constitutional analysis set forth in *Roberts* and *Rotary*, it is clear why the Court found both Jaycees and Rotary Clubs to be well outside the category of relationships worthy of constitutional protection. In *Rotary*, the Court noted that "[i]n August 1982 . . . International comprised 19,788 Rotary Clubs in 157 countries, with a total membership of about 907,750." 55 U.S.L.W. at 4607.

In addition, while individuals were admitted to membership according to a "classification system," membership rules and procedures were left up to the local. Although membership was limited to men, local Rotary Clubs ranged in size from 20 to 900 members, had no upper limit on membership, and were encouraged to enlarge the membership to include a "cross-section of the business and professional life of the community." 55 U.S.L.W. at 4608. The Court also found that many of Rotary Clubs' central activities were carried on in the presence of strangers, Rotary Club members from other chapters were welcome at meetings and members were encouraged to invite business associates and competitors to meetings. Joint meetings and other joint activities were permitted, and Rotary Clubs were encouraged to seek media coverage of their meetings and activities. 55 U.S.L.W. at 4609. Thus, the Court's analysis of Rotary Clubs was premised on an examination of the organization's practices and policies and their impact on the club's private status. Only after performing such an analysis did the Court find Rotary Clubs to be outside the zone of privacy which would entitle them to constitutional protection.

In *Roberts*, the Court focused on the fact that in 1981, the Jaycees "had approximately 295,000 members in 7,400 local chapters affiliated with 51 state organizations. There were at that time about 11,915 associate members." 468 U.S. at 613. Moreover, the Jaycees were actively engaged in "community programs related to charity, sports, and public health." 468 U.S. at 614. In addition, the many thousands of Jaycees' members around the country were admitted to membership without having to meet any established criteria save for a requirement that the applicant be a male between the ages of 18 and 35. 468 U.S. at 613. The Jaycees also permitted "numerous nonmembers of both genders regularly [to] participate in a substantial portion of activities central to the decision of many mem-

bers to associate with one another, including many of the organization's various community programs, awards ceremonies, and recruitment meetings." 468 U.S. at 621.

Contrary to these fundamental principles, Local Law 63 was designed to foreclose inquiry into whether a private club is among the class of associations the Court has found to be entitled to constitutional protection. Rather, the Local Law establishes the irrebuttable presumption that an association which meets the three-pronged test is entitled to no constitutional protection at all, irrespective of whether it possesses the attributes which the Court has deemed constitutionally significant. Instead, it may be subject to extensive state regulation going to the heart of its composition and operation.⁷

The unifying principle to be gleaned from the Court's cases in this area, therefore, is that the constitutional analysis must focus on the nature of the organization's objective characteristics, its policies and practices, and the degree to which the policies and practices of the association reinforce the distinction between members and nonmembers. The focus of the constitutional inquiry is the manner in which the club conducts itself and the nature of "club life."⁸

⁷ This is because once an organization is defined as a "place of public accommodation" under Title 8 of the Administrative Code, the City Human Rights Commission possesses sweeping power to order "the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons." § 8-109(2)(c). This power, coupled with Local Law 63's mandate, accords any member the standing to challenge any internal policy of the club which, in the member's judgment, constitutes a deprivation of a privilege. The challenge could be as significant as the denial of membership to someone, or as mundane as the allotment of athletic facility hours or equality of physical plant facilities for a gender-based class of members.

⁸ The Court's analyses in both *Rotary* and *Roberts* of the associations' practices and policies is supported by the decisions of other courts which have considered whether an association is private. In *Cornelius v. Be-*

Based upon the foregoing authorities, it is clear the individual prongs of Local Law 63 do not reflect the Court's concern in *Rotary* that the constitutional analysis be a "careful assessment" of the relationship's "objective characteristics." For example, Local Law 63 applies to all clubs with more than 400 members. While the Court did consider the size of the association to be a relevant factor, it did not fix a specific number beyond which an organization simply did not warrant constitutional protection. In *Rotary*, for example, the Court noted that the size of the local Rotary Clubs ranged from "fewer than 20 to more than 900." 55 U.S.L.W. at 4608. Size, like all other factors considered by the Court, is relative.

The Court also did not have the opportunity to assess the impact highly selective membership policies may have on size. Both the Rotary Clubs and the Jaycees had relatively unselective and non-exclusive membership policies.

nevolent Protective Order of Elks, 382 F. Supp. at 1203, the district court identified eight factors which should be considered in determining whether a club is private, including, *inter alia*, selectivity in admissions, existence of formal membership procedures, degree of membership control over internal governance and the use of club facilities by non-members. The most important, however, was membership practices. See also *Kiwanis International v. Ridgewood Kiwanis Club*, 806 F.2d at 473 (key test for whether an association is a "place of public accommodation" is whether it issues open invitation to members of public at large, or is selective in its membership policies); cf. *State of New York v. Ocean Club, Inc.*, 602 F. Supp. 489 (E.D.N.Y. 1984) (Ocean Club held to be a "place of public accommodation" because membership extended to large, infinite segment of public with no plan of exclusivity, many members have no control over club governance, members actively solicited from public at large and major club facilities used by general public); *Wright v. Cork Club*, 315 F. Supp. 1143 (S.D. Tex 1970) (Cork Club found to be a "place of public accommodation" because it did not carefully screen applicants for membership, did not limit use of facilities to members and *bona fide* guests, was not controlled by the membership, was not operated solely for benefit and pleasure of members, and directed publicity to more than just its members for their information and guidance).

In contrast, NYSCA's members have highly selective membership practices which reinforce a sense of intimacy notwithstanding the number of members. For example, these practices require that prospective members be proposed and seconded by persons who are already club members. As a result, the membership is comprised of an interlocking and overlapping network of relationships between persons who know each other as social intimates. Such organizations would ordinarily possess the requisite degree of intimacy to bring them within the Court's zone of protected association, notwithstanding the fact that they may have more than 400 members. Local Law 63, however, precludes them from making this showing.

Nor does the "provides regular meal service" criterion of Local Law 63 bear any relationship to the kinds of attributes the Court considered significant in *Rotary*. Neither *Rotary* nor *Roberts* ever mentioned food service, or the lack of it, as an association practice which may influence whether a club is sufficiently intimate for constitutional protection. Accordingly, the Local Law's use of this criterion to create an irrebuttable presumption cannot be sustained.

Third, Local Law 63's concept of regular receipt of payments from or on behalf of nonmembers⁹ for furtherance

⁹ The City claims that it is justified in classifying clubs which regularly receive payments directly or indirectly from *nonmembers* for furtherance of trade or business as "not distinctly private." What the City fails to say is that Local Law 63 also classifies as non-private a club which *never* receives *any* payment directly or indirectly from a non-member for furtherance of trade or business. Under Local Law 63, as construed by the Regulations of the New York City Commission on Human Rights, a club is not distinctly private if it receives payments from its *own members* for nonmember guests if those payments are in furtherance of trade or business. Regulation §1(c) ("Payment on behalf of a nonmember" shall mean payment by a *member* or nonmember for expenses incurred for dues, fees, use of space, facilities, services, meals or beverages by or for a nonmember.") (emphasis added). If members

of trade or business has never been discussed by the Court as relevant, much less determinative, of a club's private status. Indeed, the Court recognized in *Rotary* that the mere fact that a nonmember corporation pays for a member's dues and perceives that some business advantage will inure to it for making the payment, is not dispositive of whether a club is or is not private. The record in *Rotary* disclosed that "some individual Rotarians derive sufficient business advantage from Rotary to warrant deduction of Rotarian expenses in income tax calculations or to warrant payment of those expenses by their employers App. to Juris Statement B-3." 55 U.S.L.W. at 4607. The Court, however, did not deem these facts significant enough to even address in its analysis. Nevertheless, Local Law 63, as interpreted by the regulations, adopts the position that where an organization which is otherwise selective and private accepts revenues directly or indirectly from or on behalf of nonmembers (including payments by members for nonmember guests) it thereby automatically loses its "distinctly private" status.

Local Law 63's use of the term "for furtherance of trade or business" also does not meet the Court's requirement

of a club on 52 occasions have one nonmember guest for lunch (or even just a drink) during the course of a year and the conversation with the guest is in furtherance of trade or business, then the club is no longer distinctly private under the local law as construed by the regulations. That is so even if the member making the payment is not reimbursed therefor by anyone. The club would be regularly receiving payment from members for meals or drinks for nonmembers (guests) and it is doubtful that a club could meet the burden of proving that the lunches or drinks were not in furtherance of a trade or business without taking a transcript of the conversation between the members and the nonmember guest. The cost of the 52 lunches or drinks would be a miniscule percentage of the payments received by the club from its members. Local Law 63, as interpreted by the regulations, is completely inconsistent with the ordinary meaning of the term "distinctly private." It has never affected the private nature of a club to have its members discuss business at the club over a meal or a drink with a nonmember guest.

that the participation of nonmembers be substantial in order to render the association public. In *Rotary*, the Court noted that "[m]any of the Rotary Clubs' central activities are carried on in the presence of strangers." 55 U.S.L.W. at 4609 (emphasis added). In *Roberts*, the Court relied on the fact that "[n]umerous nonmembers of both genders regularly participate in a substantial portion of [Jaycees'] activities" 468 U.S. at 621 (emphasis added). Local Law 63, however, lacks this requirement. "Regularly" does not mean "substantial." Thus if a club with five hundred members and a \$2,500,000 budget receives 52 ten dollar checks over a twelve month period from a single member relating to the trade or business of a nonmember, the club automatically loses its entitlement to the "distinctly private" exemption. Assuming, *arguendo*, that acceptance of nonmember revenue is somehow equivalent to "public" activity (a position the Court has never adopted), it is impossible to reconcile how the acceptance of trivial and insignificant amounts of such payments renders a club "public." This is especially true where the nonmembers who make payments are excluded from and have no impact on the use, operation and governance of the club.

Thus, the third prong of Local Law 63 does not withstand scrutiny. This is because it is the screening and acceptance on subjective grounds of the member, not his financial backer, which is relevant to a public versus private analysis. In *Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis International*, in an analogous context, the court observed that:

The fact that individual members may use their membership in a club to further their own business interests does not, in any way, change the avowed purposes of the organization, or convert it into a commercial club. There can be no doubt that membership in a golf club, for example, may be used by some members to promote business connections and that certain employers of such

members might even pay their dues. It is also conceivable that there are some who join a charitable or religious organization and become active therein, because of possible selfish or commercial benefits. Should the activities or motives of some individual members be sufficient to convert such organization itself into a commercial enterprise?

83 Misc. 2d 1075, 1078, 374 N.Y.S.2d 265, 268 (Sup. Ct. 1975), *aff'd*, 52 A.D.2d 906, 383 N.Y.S.2d 383 (2d Dep't 1976), *aff'd*, 41 N.Y.2d 1034, 395 N.Y.S.2d 633, 363 N.E.2d 1378 (1977), *cert. denied*, 434 U.S. 859. *Cf. Kiwanis International v. Ridgewood Kiwanis Club*, 806 F.2d at 478 (Adams, J., concurring) (fact that employers often pay dues of employee members not dispositive in determining whether association is "distinctly private").

B. Expressive Association

Local Law 63 is also unconstitutional because it precludes NYSCA's members from demonstrating that regulation under the public accommodations laws would violate their rights of expressive association. "The Court has . . . recognized that the right to engage in activities protected by the First Amendment implies 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.' . . . For this reason, '[i]mpediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment . . .'" *Rotary*, 55 U.S.L.W. at 4609 (citations omitted).

In *Rotary* the Court examined Rotary Clubs' expressive activities, and noted that "[a]s a matter of policy, Rotary Clubs do not take positions on 'public questions,' including political or international issues." *Id.* However, the Court found that Rotary Clubs did engage in a variety of commendable service activities that enjoy First Amendment protection. Notwithstanding these rights of expressive association, the Court held that the application of California's

anti-discrimination law to Rotary Clubs would have no effect on their basic activities. "It does not require them to abandon their basic goals of humanitarian service, high ethical standards in all vocations, good will and peace. Nor does it require them to abandon their classification system or admit members who do not reflect a cross-section of the community." *Id.* Indeed, the Court stated that by opening up membership to women, Rotary Clubs would obtain a broader cross-section of the community. *Id.* See also *Roberts*, 468 U.S. at 627.

Local Law 63, however, does not permit any private club that meets the three prongs—whether organized for primarily political, artistic, cultural, social or athletic purposes—to demonstrate that by being required to admit a member that club members do not want, the nature of the club's expressive association may be compromised. For example, certain clubs coming within the tripartite test may well exist primarily for purposes of espousing unpopular ethnic, racial or gender related positions. To force the admission of persons who either espouse contrary views or whose presence is inimical to the views of the club, plainly interferes with the right of expressive association. *Cf. Wooley v. Maynard*, 430 U.S. 705, 715 (1977) ("We are faced with a state measure [compulsory display of state motto "Live Free or Die" on automobile license plate] which forces an individual, as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'")

Similarly, the decision of some of NYSCA's members to organize along single gender lines is an expression of their belief that certain types of social intimacy and discourse may only be achieved in single sex settings. Unlike international community service organizations which are affiliated with large internationals, the compulsory admis-

sion of new members in violation of selective clubs' membership policies defeats the *raison d'être* of these clubs.

The Court has explained that "there can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together." *Roberts*, 468 U.S. at 623. "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." L. Tribe, *American Constitutional Law*, at 791 (1978), *quoted with approval in Democratic Party of U.S. v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 n.22 (1981) (freedom to associate "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.")

Notwithstanding the foregoing, Local Law 63 seeks to impose the full panoply of anti-discrimination legislation (including ordering the admission of new members) on all kinds of associations on the ground that, by satisfying the tripartite test, the association has forfeited its expressive rights because it has become essentially "commercial." This superficial rationale simply does not withstand analysis. This is because in the course of human interactions there can be business components, social components, intimate components or all three. As Justice O'Connor explained:

Many associations cannot readily be described as purely expressive or purely commercial. No association is likely ever to be exclusively engaged in expressive activities And innumerable commercial associations also engage in some incidental protected speech or advocacy. The standard for deciding just how much of an association's involvement in commercial activity

is enough to suspend the association's First Amendment right to control its membership cannot, therefore, be articulated with simple precision. . . .

[A]n association should be characterized as commercial, and therefore subject to rationally related state regulation of its membership and other associational activities, when, and only when, the association's activities are not predominantly of the type protected by the First Amendment. It is only when the association is predominantly engaged in protected expression that state regulation of its membership will necessarily affect, change, dilute or silence one collective voice that would otherwise be heard.

Roberts, 468 U.S. at 635-36 (O'Connor, J., concurring). Local Law 63, however, does not distinguish between predominantly commercial associations and others which have been organized for predominantly social, cultural, political or other expressive purposes, but which may have incidental commercial activity. This is because Local Law 63 does not permit associations to demonstrate that the alleged commercial activity (receipt of income from or on behalf of a nonmember directly or indirectly for furtherance of trade or business) is merely incidental to the club's purposes. Accordingly, the Local Law is unconstitutional.

Moreover, it will directly abridge the rights of freedom of speech enjoyed by NYSCA's members. For example, under Regulation ¶1(d), whether a meal payment is in furtherance of trade or business is determined by the content of the participants' conversation during the meal. In order to preserve traditional membership policies of a club, Local Law 63 effectively inhibits certain kinds of speech which, while in a social setting, may indirectly be deemed to further the business interests of the speakers.

Local Law 63 seeks to destroy the foundations of private clubs and associations. Many of NYSCA's members have created a good will among their membership by assiduously guarding their rights of association, speech and privacy. Indeed, membership in private social clubs expresses self-identification. Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 635-37 (1980). Changing the nature of the club necessarily infringes on the identification.

The unprincipled consequences of Local Law 63 are infinite: women's organizations will be forced to admit men;¹⁰ a gay businessman's association would be forced to admit women; a black businessman's organization would be forced to admit whites; and an Italian anti-defamation league would be forced to admit non-Italians. The richness of American culture is diluted, not enhanced, by such results. Discrimination in public places is unjust, and the law confers upon federal, state and local officials the authority to remedy such proscribed conduct. Local Law 63, however, is a direct assault on cherished constitutional principles applying to private places.

C. Overbreadth

In *Village of Schaumburg v. Citizens for a Better Environment*, the Court described the contours of the overbreadth analysis:

Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court In these First Amendment contexts, the courts are inclined to

¹⁰ This is another example of Local Law 63's overbreadth. While the language of Local Law 63 does not limit its application, its avowed purpose was to give women and minorities greater access to business opportunities. Admitting men to women's clubs does not advance this purpose. See Point IC, *infra*.

disregard the normal rule against permitting one whose conduct may validly be prohibited to challenge the proscription as it applies to others because of the possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute.

444 U.S. 620, 634 (1980) (citations omitted). See also *Grayned v. City of Rockford*, 408 U.S. 104, 114-15 (1972). In this context, a legislative enactment may also prove overbroad because it will "chill" an individual's exercise of his constitutionally protected rights, regardless of whether that individual could be successfully prosecuted under the enactment. *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965); *NAACP v. Button*, 371 U.S. 415, 432-33 (1963).

Overbreadth analysis has been applied to conduct which the first amendment, by its broad terms, seeks to protect. See, e.g., *United States v. Robel*, 389 U.S. 258, 266 (1967) (overbreadth attack sustained because statute "seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights."); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (city ordinance which prohibited "annoying" assemblies of three or more persons on the street "unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.")

Assuming, *arguendo*, that the City has the right to impose anti-discrimination legislation on clubs which meet the tripartite test, see, e.g., *Roberts*, Local Law 63 is nonetheless unconstitutionally overbroad.¹¹ There is a substantial likelihood that associations which are organized around the most cherished of all constitutional protections, *viz.*,

¹¹ Overbreadth was not considered in *Rotary* because it was not properly raised. In contrast, NYSCA has raised overbreadth at every stage of the proceedings.

the exercise of political speech and religious freedom, will be subject to the very kind of governmental interference the first amendment was intended to prohibit. Imposing anti-discrimination legislation on associations which exist in New York City to promote political, social, ethnic or cultural interests advances no articulable social policy, let alone a compelling state interest.

More significant for constitutional purposes, however, is the fact that these groups have associational, speech and privacy rights which are constitutionally protected, *see, e.g., Rotary*, 55 U.S.L.W. at 4609; *Jaycees*, 468 U.S. at 622, and which Local Law 63 threatens to chill. For example, a social, political or cultural club presently comprised of 300 members will avoid increasing its membership for fear of coming within the provision's 400-members criterion and exposing its members to an investigation to ascertain whether it is indeed a place of public accommodation. Members' speech rights will be affected as the Human Rights Commission casts about for some means of ascertaining whether a payment was "for furtherance of trade or business." To the extent this becomes a test based upon what was discussed during a meeting or meal, it is an unconstitutional regulation of speech based upon its content.

II. LOCAL LAW 63's EXEMPTION OF BENEVOLENT ORDERS AND RELIGIOUS CORPORATIONS VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION.

The Court should also note probable jurisdiction on the question of whether it is a violation of the equal protection guarantees of the fourteenth amendment for Local Law 63 to exclude benevolent orders and religious corporations from its ambit. In finding that Local Law 63 did violate NYSCA's members' right to equal protection, Justice Kupperman of the Supreme Court, Appellate Division stated:

Unfortunately, in the effort to limit discrimination, the very Local Law 63 is, in itself, discriminatory in that it denies equal protection to similarly-situated persons. *See Rostker v. Goldberg*, 453 U.S. 57, 79.

....

The Benevolent Orders Law lists a large number of organizations with substantial membership and eating facilities, which would, accordingly, be exempt, even though they would otherwise be in the category that should be subjected to a non-discrimination clause. *See Roberts v. United States Jaycees*, [468 U.S. 609].

Appendix at 21a.

"The Equal Protection clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439 (1985); *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587-88 (1979). When legislation creates an inconsistent burden on the fundamental rights of similarly-situated persons, such an enactment, absent a compelling state interest, is unconstitutional. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969) (denying welfare benefits to applicants for failure to meet residency duration requirements). Even a compelling state interest alone, however, will be insufficient to uphold the statute; the law must be drawn in a manner so that it employs the least drastic means to achieve its avowed purpose. *See, e.g., Plyler v. Doe*, 457 U.S. at 217 ("With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental inter-

est."); *Shapiro v. Thompson*, 394 U.S. at 618; *Shelton v. Tucker*, 364 U.S. at 479.

On its face, Local Law 63 denies equal protection to similarly-situated persons. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981). Cf. *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 581 (1983) (under a first amendment analysis, the Court struck a state tax statute because it "is facially discriminating, singling out publications for treatment that is . . . unique in Minnesota tax law."). After creating the three-pronged litmus test, Local Law 63 provides:

For the purposes of this section a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or the religious corporations law shall be deemed to be in its nature distinctly private.

As demonstrated above, Local Law 63 implicates NYS-CA's members' fundamental rights of association, privacy and speech; accordingly, it must withstand a heightened scrutiny to survive challenge. See, e.g., *Plyler v. Doe*, 457 U.S. at 217 n.15 ("In determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein."); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (applying fundamental rights breach of equal protection analysis in right to associate context). See also *Rotary*, 55 U.S.L.W. at 4609. The invocation of the strict scrutiny standard of review carries with it a presumption of the challenged statute's unconstitutionality. See, e.g., *Plyler v. Doe*, 457 U.S. at 216.

Where the state law infringes a constitutionally protected right, the state must demonstrate "that its classification is necessary to accomplish a compelling state

interest." *Attorney General of New York v. Soto-Lopez*, ___ U.S. ___, 106 S. Ct. 2317, 2322 (1986). In light of the City's stated objective in enacting Local Law 63 to eliminate invidious discrimination in places of public accommodation, the City's exclusion of an entire class solely to permit it to engage in the very practices sought to be eradicated by the Local Law cannot be justified. This is especially true where, as here, the exemption is completely at odds with the Local Law's stated objective.

By excluding benevolent orders and religious corporations from Local Law 63, the City admits that the very conduct targeted by the Local Law occurs in such organizations. Indeed, if nonmember business activity (as described by Local Law 63) did not regularly occur in such organizations, they would fail the Local Law's third prong and be excluded on that basis, just as a great many other groups are excluded. Under these circumstances, a specific exclusion for benevolent orders and religious corporations would serve no purpose in furthering any legitimate legislative objective.

Local Law 63 is ostensibly designed to permit the classification of clubs as public accommodations if certain commercial activities regularly occur therein. No testimony before the City Council indicated that benevolent orders or religious corporations do not have significant business activity. See, e.g., Local Law 63 ("Because small clubs, benevolent orders and religious corporations have not been identified in testimony before the Council as places where business is prevalent, the Council has determined not to apply the requirements of this local law to such organizations.") Thus, the City seeks to uphold Local Law 63 based upon a lack of evidence before the City Council that any significant business activity took place at the meeting places of benevolent orders and religious corporations. This argument does not withstand equal protection scrutiny.

An absence of evidence, without more, cannot stand even as a rational basis for a statutory classification. The City must show affirmatively that the evidence before the legislature reasonably supported the exclusion. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464-65 (1981) (absence of any evidentiary support for legislative classification renders statute constitutionally infirm).

Indeed, to the extent that there was any evidence at all before the City Council,¹² it supported the conclusion that there is no distinction between the exempt organizations and NYSCA's members.¹³ Just as benevolent or-

¹² The Court has struck down laws which create irrational classifications especially where the legislative history indicates that no affirmative evidence supported a class based exemption. See, e.g., *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266, 272-74 (1936) ("In the absence of any such showing, we have no right to conjure up possible situations which might justify the discrimination. The classification is arbitrary and unreasonable and denies the appellant the equal protection of the law.")

¹³ Throughout the course of this litigation, NYSCA has opposed the City's use of triple hearsay vignettes concerning the alleged practices of private clubs which were spilled across the informal legislative record maintained by the City Council. However, to the extent this Court will consider Local Law 63's "legislative history," despite its never having been formally made a part of the record at any stage of this proceeding, it reveals that the Council was presented with the December 22, 1983 written comments of the Conference of Private Organizations which stated that there was no substantial basis for the benevolent orders exemption. Similarly, in a report entitled, "Behind Closed Doors," by Edith Lynton based on City Commission on Human Rights Hearings, annexed as an exhibit to the testimony of Jack Greenberg, the City Human Rights Commission itself argued that "after careful consideration" no exemption for religious or ethnic groups was appropriate. The Commission's view continued: "As already discussed in connection with pending legislation before the City Council, the Commission is willing to accept such exemptions as are required to secure passage, but will continue its efforts beyond 1975 to secure an all-encompassing version." *Id.* at 63. Moreover, during the public hearing on Local Law 63, Council Member Friedlander also indicated that there was no reason for the exemption. Excerpts from Meeting of the Committee on General

ders are formed primarily for the ongoing social relationship of their members so, too, as the record demonstrates, are NYSCA's members formed. Various cases have shown that benevolent orders conduct their affairs no differently from certain private clubs which were targeted by the City Council. See, e.g., *Pennsylvania Human Relations Comm'n v. The Loyal Order of Moose*, 220 Pa. Super. 356, 286 A.2d 374 (1971) (Moose Lodge has dining and bar facilities available for business meals and rents out its facilities to nonmembers), *rev'd on other grounds*, 448 Pa. 451, 294 A.2d 594 (1972); *Monarch Lodge v. City of New York*, 5 Misc. 2d 414, 125 N.Y.S.2d 226, 227 (Sup. Ct. 1953), *aff'd*, 283 A.D. 692, 128 N.Y.S.2d 533 (1st Dep't 1954) (in denying sales tax exemption, special term finds Elks is "not operated for exclusively religious, charitable or educational purposes [Elks] maintains for its members meeting rooms, offices and various other rooms, as well as a kitchen, dining room, barroom and lounge [Elks'] other income came from membership dues (which are a very small proportion of the total gross income), sales of drinks, banquets, dances, boat rides and other operations.")

Nothing in the statutes which create benevolent orders or religious corporations prohibit either group from receiving funds indirectly from nonmembers in the furtherance of trade or business. A local merchant may have as much business reason to join the Elks or Moose or Veterans of Foreign Wars and obtain nonmember business reimbursement as another merchant may have to join a private club. The City's effort to create a distinction between the two kinds of organizations is simply grasping at straws. Indeed, the necessity of exempting certain organizations from the three-prong definition can only signify that the conduct Local Law 63 seeks to regulate is equally prevalent in those organizations.

Welfare, December 2, 1983 at 45. See also testimony of Linda Blackburn, Esq., *id.* at 81 *et seq.* (indicating no basis for exemption).

Thus, undoubtedly, the only basis for the invidious classification was its political expediency. Absent the exemption presumably no law could have passed. By drawing the legislation in such an underinclusive manner—without any affirmative evidence to support such classification—the City Council violated the equal protection clause. As Justice Jackson observed in *Railway Express Agency v. New York*, 336 U.S. 106, 112-13 (1949) (concurring): “Conversely, nothing opens the door to arbitrary actions so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.” Accordingly, Local Law 63 is unconstitutional because it violates the equal protection clause of the federal constitution.

CONCLUSION

For the foregoing reasons, NYSCA respectfully requests that the Court note probable jurisdiction.

Dated: May 15, 1987

Respectfully submitted,

ALAN MANSFIELD
Counsel of Record

ANGELO T. COMETA
LOUIS J. LEFKOWITZ
DEBRA A. ROTH
40 West 57th Street
New York, NY 10019
(212) 977-9700

Attorneys for Appellant

APPENDIX

**Court of Appeals
State of New York**

The Hon. Sol Wachtler, Chief Judge, Presiding
NEW YORK STATE CLUB ASSOCIATION, INC.,
Appellant,
v.

THE CITY OF NEW YORK, et al.,
Respondents.

The appellant in the above entitled appeal appeared by Phillips, Nizer, Benjamin, Krim and Ballon, Esqs.; the respondent(s) appeared by Hon. Frederick A. O. Schwarz, Jr., Corporation Counsel of the City of New York; the amicus curiae appeared by Judith I. Avner, Esq.; Hon. Robert Abrams, Attorney General of the State of New York; and Margarita Rosa, Esq., Counsel, Division of Human Rights.

The Court, after due deliberation, orders and adjudges that the order affirmed, with costs. Opinion by Chief Judge Wachtler; Judges Simons, Kaye, Alexander, Titone, Hancock and Bellacosa concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ DONALD M. SHERAW
DONALD M. SHERAW,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, February 17, 1987

**STATE OF NEW YORK
COURT OF APPEALS**
NEW YORK STATE CLUB ASSOCIATION, INC.,
Appellant,
v.
CITY OF NEW YORK, *et al.*,
Respondents.

OPINION

Angelo T. Cometa, Louis J. Lefkowitz, Alan Mansfield & Debra A. Roth, NY City, for appellant.
Frederick A. O. Schwarz, Jr., NYC Corporation Counsel (Patricia A. O'Malley, Leonard Koerner & Caryn M. Hershleifer of counsel) or respondent.

WACHTLER, CH. J.:

Sensitive to the reality that business is often conducted and professional contacts initiated and renewed in private clubs, the City of New York in 1984 adopted Local Law No. 63. The law is intended to prohibit discrimination in those clubs which, in essence, provide benefits to business entities and to persons other than their own members, thereby assuming a sufficient public character that they should forfeit the "distinctly private" exemption of the City's Human Rights Law.¹ Today, we uphold Local Law No. 63 as a valid and constitutional exercise of the police power of the City of New York.

The New York City Human Rights Law (Administrative Code of City of New York, tit 8) forbids invidious discrimination in "place[s] of public accommodation, resort or amusement" (Administrative Code §8-107 [2]). It excludes from its definition of "public accommodation" "any institution, club or place of accommodation which . . . is in

¹ See, Legislative Declaration, Local Laws, 1984, No. 63 of City of New York §1.

its nature distinctly private" (Administrative Code §8-102 [9]). As it originally read, the City Human Rights Law did not amplify what it meant by the term "distinctly private". On October 9, 1984, the City Council enacted Local Law No. 63, which states that a club "shall not be considered in its nature distinctly private if it [1] has more than four hundred members, [2] provides regular meal service, and [3] regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business" (Local Laws, 1984, No. 63 of City of New York, amending Administrative Code §8-102 [9]).

The need for this legislation, according to the extensive findings of the City Council, was to realize the City's "compelling interest in providing its citizens . . . regardless of race, creed, color, national origin or sex . . . a fair and equal opportunity to participate in the business and professional life of the city". The City Council found that business activity pervades clubs which have more than 400 members and regularly provide meals during which business is conducted. The Council further recognized that employers often pay the dues and expenses of their employees because the activities at the clubs help to develop the employers' own business. In these circumstances, the Council concluded, denial of access to club facilities constitutes a significant barrier to the professional advancement of women and minorities since business transactions are often conducted in such clubs, and personal contacts valuable for business purposes, employment and professional advancement are formed.

Immediately after the Mayor signed Local Law No. 63, plaintiff New York State Club Association, Inc., a consortium of some 125 private clubs—many of which, according to plaintiff's affidavit, "intentionally have been organized along national origin, religious, ethnic and gender lines"—commenced this action against various City

defendants for a judgment declaring Local Law No. 63 unconstitutional.

Plaintiff's primary contention on this appeal is that Local Law No. 63 violates the "home rule" provision of the New York State Constitution (art IX, §2(c)) because it is inconsistent with the State Human Rights Law (Executive Law §290 *et seq.*), as construed by this court, and, therefore, constitutes an invalid exercise of the City's police power.

I.

A.

The constitutional home rule provision confers broad police power upon local government relating to the welfare of its citizens² (*see, People v De Jesus*, 54 NY2d 465, 468). However, it places two firm restrictions on their use: (1) the local government (here, the City of New York) may not exercise its police power by adopting a local law inconsistent with constitutional or general law; and (2) the City may not exercise its police power when the Legislature has restricted such an exercise by pre-empting the area of regulation (*Consolidated Edison Co. v Town of Red Hook*, 60 NY2d 99, 105; *People v Cook*, 34 NY2d 100, 105-106). The legislative intent to preempt need not be express. It is enough that the Legislature has impliedly evinced its desire to do so and that desire may be inferred from a declaration of State policy by the Legislature or

² NY Constitution, art IX, §2(c) provides in pertinent part:

"In addition to powers granted in the statute of local governments or any other law * * * (ii) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government * * * The government, protection, order, conduct, safety, health and well-being of persons or property therein" (i.e., the police power).

from the legislative enactment of a comprehensive and detailed regulatory scheme in a particular area.

Similarly, with respect to inconsistency, we have stated that there need not be an express conflict between State and local laws to render a local law invalid (*Consolidated Edison Co. v Town of Red Hook*, 60 NY2d, at p 108, *supra*). Rather, "inconsistency has been found where local laws prohibit what would have been permissible under State law or impose 'prerequisite "additional restrictions"' on rights under State law, so as to inhibit the operation of the State's general laws" (*id.*, quoting *F.T.B. Realty Corp. v Goodman*, 300 NY 140, 147-148 [citations omitted]).

The issues have been narrowed by the parties with the plaintiff having made two concessions. First, plaintiff does not question the City's underlying authority to exercise the police power it possesses in the area of human rights (*cf. Wholesale Laundry Bd. v City of New York*, 17 AD2d 327, 328-329, *aff'd* 12 NY2d 998 [local law challenged on grounds of lack of home rule authority and as inconsistent]). Also important, plaintiff acknowledges on this appeal that the State has not preempted the field of antidiscrimination legislation by enacting the human rights provisions of the Executive Law (§290 *et seq.*). Having made these concessions—especially the latter—plaintiff would have us attach no legal significance to them and seeks to focus instead on the purported inconsistency of Local Law No. 63. A finding of inconsistency alone would require invalidation of Local Law No. 63, but in this case the distinction between preemption and inconsistency plaintiff urges is not so neat. For "these two [alleged] infirmities are often interrelated" (*Consolidated Edison Co. v Town of Red Hook*, at p 105, *supra*; *see also, Monroe-Livingston Sanitary Landfill v Town of Caledonia*, 51 NY2d 679, 683).

We turn, then, to an examination of the State statutory scheme, there being no serious question that the City may

indeed regulate in this area so long as the regulation is consistent.

B.

The State Human Rights Law begins with the declaration that "[i]t shall be deemed an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of this state, and in fulfillment of the provisions of the constitution of this state concerning civil rights" (Executive Law §290 [2]). The State statute forbids certain invidious discrimination by "any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin, sex, or disability or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof" (Executive Law §296 [2] [a]). It defines "place of public accommodation" "inclusively and illustratively, not specifically" (*Matter of United States Power Squadrons v State Human Rights Appeal Bd.*, 59 NY2d 401, 409, *rearg dismissed* 60 NY2d 682, 702), setting forth an extensive list of examples of facilities that fall within the ambit of the statute (Executive Law §292 [9]). Notably, in language identical to that employed in the City's Human Rights Law, the State law excludes from the definition of "public accommodation" "any institution, club or place of accommodation which is in its nature distinctly private" (Executive Law §292 [9]). Unlike the City counterpart, the State Human Rights Law contains no legislative definition of the term "distinctly private".

In the face of this omission and in the absence of any claimed or apparent legislative design to preempt the area of antidiscrimination legislation, the precise question presented is whether the police power to govern with respect to public welfare, health and peace—inherent in the State,

yet also delegated to municipalities under the Constitution's home rule provision—permits the City to define for itself when a club loses its "distinctly private" nature.

People v Judiz (38 NY2d 529) presented a comparable problem. A provision of the State's Penal Law (§265.01 [2]) prohibited the possession of, among other things, any imitation pistol "with intent to use the same unlawfully against another" (*id.*, at p 531). We upheld the defendant's conviction of possession of a toy pistol painted to resemble a real Luger pistol under a City ordinance which, by contrast, prohibited the possession or use of any toy or imitation pistol or revolver which substantially resembled an actual pistol or revolver; specific intent to use the toy weapon was not an element of the local law (*id.*, at pp 530-531). We held, first, that the State had not preempted the field, and, second, that the local law was not impermissibly inconsistent, reasoning that the Penal Law failed to define the term "imitation pistol": the State law "evinced an intent to cover, quite broadly, most of the possible categories of weapons for which it deem[ed] some sanction necessary when these are used with illegal intent, [but] the city ordinance is aimed at the prevention of a more particular type of abuse" (*id.*, at p 532; *see also*, *Council for Owner Occupied Hous. v Koch*, 119 Misc 2d 241, 247, *aff'd* 61 NY2d 942).

Similarly, in the present case, the City possesses broad home rule power and the State concededly has not preempted the area of antidiscrimination. That the field has not been preempted must mean that the Legislature would permit the City, consistent with both the letter and spirit of the State Human Rights Law, to regulate on its own in the face of the more particular situation it has found in its private clubs (*see*, *People v Cook*, 34 NY2d 100, 109, *supra*; *People v Judiz*, 38 NY2d 529, 532, *supra*). Indeed, the State's failure to define the term "distinctly private" suggests a legislative intent to allow local governments to enact pursuant to the municipal home rule

power definitions that are not inconsistent with the meaning of this broad term.

Plaintiff acknowledges that no impermissible inconsistency exists between the State statute itself and the definition provided by Local Law No. 63; rather, it urges that the City's parochial view of what a "distinctly private" club is conflicts with the working definition we supplied for that term for purposes of the State Human Rights Law in *Power Squadrons* (59 NY2d 401, *supra*). There, we emphasized that whether a "distinctly private" club is a place of public accommodation is a question of fact (*id.*, at p 412). We set forth—in permissive terms—five factors that may be considered in determining whether the statutory exemption applies (at pp. 412-413): "[i]n determining the issue, the fact finder may consider whether the club (1) has permanent machinery established to carefully screen applicants on any basis or no basis at all, i.e., membership is determined by subjective, not objective factors; (2) limits the use of the facilities and the services of the organization to members and bona fide guests of members; (3) is controlled by the membership; (4) is nonprofit and operated solely for the benefit and pleasure of the members; and (5) directs its publicity exclusively and only to members for their information and guidance". We in no way suggested that failure to meet these precise criteria would be the only way that a club could be found to be not "distinctly private". Indeed, we derived those five factors from case law decided under the more liberal Federal civil rights statute (*Wright v Cork Club*, 315 F Supp 1143, 1153; 42 USC §2000a [e]; see, Note, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 NYU Rev L & Soc Change 215, 251) that excludes from its purview "private clubs or other establishments not in fact open to the public" (42 USC §2000a [e]). By contrast, the State Legislature's very use of the adverb "distinctly" in its own statutory exemption for private clubs indicates a concerted attempt to narrow

its application (see, *Matter of United States Power Squadrons v State Human Rights Appeal Bd.*, 59 NY2d, at p 412, *supra*). In keeping with the State scheme, the City employs the same modifier (Administrative Code §8-102 [9]) and limits its own private club exemption to those that do not provide "regular" meal service and do not "regularly" receive certain payments from nonmembers in furtherance of their business (Local Law, 1984, No. 63 of City of New York).

C.

The hallmark of the private club, we said in *Power Squadrons* (*supra*, at p 412), was its "selectivity in its membership". Plaintiff contends that its member clubs "steadfastly adhere to exacting standards in their admissions policies, governance and administration of their facilities"; that they therefore qualify as "distinctly private" under *Power Squadrons* (*supra*); and that Local Law No. 63 represents a radical departure from that decision. However, Local Law No. 63 does not prohibit the City fact finder from considering the test of selectivity, or, indeed, any of the *Power Squadrons* factors. It merely establishes that a private club will be deemed to have lost the essential characteristic of selectivity and instead have become "affected with a public interest" when it meets the City's three-prong test (*Matter of United States Power Squadrons v State Human Rights Appeal Bd.*, at p 414, *supra*). Thus, Local Law No. 63 does not purport to define for purposes of the City Human Rights Law all circumstances in which a club may not be "distinctly private". Rather, it merely spells out objectively in more concrete terms the circumstances when a club, because of its large size, "public nature," and volume of business related activities will be deemed to have lost the essential characteristic of privateness—i.e., selectivity. It is not unreasonable to determine that a large club which receives substantial business-related income from nonmembers cannot be selective in

its membership and use of its facilities. Therefore, Local Law No. 63's definition of "distinctly private" is not inconsistent with the use of this term in Executive Law §292 (9) as interpreted in *Power Squadrons*.

Indeed, plaintiff goes too far when it asserts, relying on *Wholesale Laundry Bd. v City of New York* (12 NY2d 998, *affg* 17 AD2d 327, *supra*), that Local Law No. 63 is inconsistent with *Power Squadrons* because activity which arguably would be permitted under State decisional law is prohibited by the local law. As we stated in *People v Cook* (34 NY2d 100, 109, *supra*): "This statement of the law is much too broad. If this were the rule, the power of local governments to regulate would be illusory". Rather, the general principle set forth in *Wholesale Laundry* applies only when the Legislature has "evidenced a desire that its regulations should preempt the possibility of varying local regulations" (*id.*; *see, Consolidated Edison Co. v Town of Red Hook*, 60 NY2d, at pp 107-108, *supra* [observing that inconsistency may exist where local laws "prohibit what would be permissible under State law . . . so as to inhibit the operation of the State's general law"] or when the State specifically permits the conduct prohibited at the local level (*see, Matter of Kress & Co. v Department of Health*, 283 NY 55, 59; 6 McQuillin, *Municipal Corporations* §23.07, at 391 [3d ed]). As we have already noted, no preemption is claimed here or is discernible from the statutory scheme (*see generally, Executive Law* §§295, 300; *General Municipal Law* §§239-o, 239-s). Moreover, neither the State Human Rights Law itself nor *Power Squadrons* mandates exemption for a club that meets the three-prong test of Local Law No. 63 (*see, People v Judiz*, 38 NY2d 529, 531-532, *supra*).

Finally, we reject plaintiff's contention that the local law impermissibly shifts the onerous burden of establishing exemption on the clubs (*see, Matter of United States Power Squadrons v State Human Rights Appeal Bd.*, 59 NY2d, at p 412, *supra*). Any allocation of the burden of proof

effected by the enactment bears a reasonable relationship to the police power and is reasonably calculated to achieve by objective means the legitimate purpose of ensuring that only "distinctly private" clubs be exempt (*see generally, D'Angelo v Cole*, 67 NY2d 65, 69; *People v Cook*, 34 NY2d 100, 107, *supra*).

II.

We next address plaintiff's argument that Local Law No. 63 violates its members' rights to privacy, free speech and association under the federal constitution.³ Using the formulation set forth by the Supreme Court in *Roberts v United States Jaycees* (468 US 609), we conclude that the law does not abridge the club members' freedom of intimate association. The definition read into the City Human Rights Law under *Power Squadrons* (59 NY2d 401, 412-413, *supra*) of "distinctly private" and the three-prong test set forth in Local Law No. 63 itself, together adequately assess "objective characteristics" of the organizations at issue, including criteria such as their "size, purpose, policies, selectivity, congeniality, and other characteristics that in [this] particular case [are] . . . pertinent" (*Roberts v United States Jaycees*, 468 US, at p 620, *supra*). In keeping with these objective and permissive factors, the law in effect deems a club that is large and where "much of the activity central to the . . . maintenance of the association involves the participation of strangers to that relationship" to have lost any claimed protection of intimate association (*Roberts v United States Jaycees*, 468 US, at p 621, *supra*).

³ Although plaintiff commenced this action on these theories under both State and Federal Constitutions, it now only claims violation of Federal law. Accordingly, we do not address any allegation of violations under analogous provisions of the State Constitution.

Nor do we address plaintiff's allegation below that Local Law No. 63 constitutes an unlawful bill of attainder (US Const, art I, §10) because it has abandoned this argument as a ground for reversal.

Plaintiff also argues that Local Law No. 63 violates its freedom of expressive association or the freedom to engage as a group in pursuit of a wide variety of "political, social, economic, educational, religious, and cultural ends" (*Roberts v United States Jaycees*, 468 US, at p 622, *supra*; see, *Griswold v Connecticut*, 381 US 479, 483; *N.A.A.C.P. v Alabama*, 357 US 449, 460-461). It is undisputed on this record that plaintiff's constituent members have been organized "to provide a comfortable and congenial social atmosphere . . . and to engage in political, academic, social and/or recreational interchange with one another on a regular and continual basis". But compelling governmental interests, unrelated to the suppression of ideas—here the City's strong public policy to eliminate discrimination against women and minorities (see, Legislative Declaration, Local Laws, 1984, No. 63 of City of New York §1; Administrative Code §8-101)—manifestly justify some infringement (*Roberts v United States Jaycees*, 468 US, at p 624, *supra*). Indeed, the City has a compelling interest in assuring to women and minorities equal access to "advantages" and "privileges" (Administrative Code §8-107 [2]) such as "[l]eadership skills, . . . business contacts and employment promotions" (*Roberts v United States Jaycees*, 468 US, at p 626, *supra*; see generally, Burns, *Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 Harv CR-CL L Rev 321 [1983]; Goodwin, *Challenging the Private Club: Sex Discrimination Plaintiffs Barred at the Door*, 13 Sw U L Rev 237, 280-284 [1982]).

Moreover, through Local Law No. 63, the City has employed the least restrictive means to achieve its ends (see, *Roberts v United States Jaycees*, 468 US, at p 626, *supra*). The law evinces an intent not to dictate the selection policies or activities of the private clubs except to the extent necessary to ensure that they do not automatically exclude persons from membership or use of the facilities on account of invidious discrimination (Legislative Declaration

§1). Notably, plaintiff has made no showing that its members' free speech rights will be abridged—either in altering the policies or functions of the various organizations (see, *Roberts v United States Jaycees*, 468 US, at p 626, *supra*; *Hishon v King & Spalding*, 467 US 69, 78), or in creating a chilling effect on the behavior of club members (see, Burns, *Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 Harv CR-CL L Rev 321, 344-345 [1983]).

Finally, although plaintiff's constituent members have a right to free speech and to association, they lack the right to practice invidious discrimination against women and minorities in the distribution of important business advantages and privileges (see, *Roberts v United States Jaycees*, 468 US, at p 628, *supra*; *Runyon v McCrary*, 427 US 160, 175-176; *Norwood v Harrison*, 413 US 455, 469). Any incidental intrusion on protected free speech rights accomplished by the local measure is no greater than is necessary to fulfill the State's legitimate purpose in extending to them equal opportunity in employment (see, *Roberts v United States Jaycees*, 468 US, at pp 628-629, *supra*).

We have considered plaintiff's other arguments and find them to lack merit. Accordingly, the order of the Appellate Division should be affirmed.

Judges Simons, Kaye, Alexander, Titone, Hancock, Jr. and Bellacosa concur.

Order affirmed, with costs.

Decided February 17, 1987

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on July 31, 1986

Present—Hon. Theodore R.	Justice Presiding
Kupferman,	
Joseph P. Sullivan	Justices.
David Ross	
Arnold L. Fein,	

26840

NEW YORK STATE CLUB ASSOCIATION, INC.,
Plaintiff-Appellant,
 -against-

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF
 NEW YORK, THE CITY HUMAN RIGHTS COMMISSION AND
 THE MEMBERS OF THE CITY HUMAN RIGHTS COMMISSION,
Defendants-Respondents.

An appeal having been taken to this Court by the plaintiff-appellant from a judgment of the Supreme Court, New York County (Louis Grossman, J.), entered on November 22, 1985, which denied its motion for summary judgment and granted defendants' cross-motion for summary judgment,

And said appeal having been argued by Angelo T. Cometa and Alan Mansfield of counsel for appellant, and by Patricia A. O'Malley of counsel for respondents; and due deliberation having been had thereon, and upon the Opinion of this Court filed herein,

It is ordered that the judgment so appealed from be and the same hereby is affirmed, without costs and without disbursements. [Kupferman, J.P., dissents in an Opinion.]

ENTER:
/s/ FRANCIS X. GALDI
 Deputy Clerk.

**STATE OF NEW YORK
SUPREME COURT, APPELLATE DIVISION**

26840

NEW YORK STATE CLUB ASSOCIATION, INC.,
Plaintiff-Appellant,
- against -

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF
NEW YORK, THE CITY HUMAN RIGHTS COMMISSION AND THE
MEMBERS OF THE CITY HUMAN RIGHTS COMMISSION,
Defendants-Respondents.

FIRST DEPARTMENT, JULY 31, 1986

Appeal from a judgment of the Supreme Court (Louis Grossman, J.), entered on November 22, 1985 in New York County, which denied a motion by plaintiff for summary judgment and granted a cross-motion by defendants for summary judgment.

Angelo T. Cometa of counsel (Louis J. Lefkowitz, Alan Mansfield and Debra A. Roth with her on the brief; Phillips, Nizer, Benjamin, Krim & Ballon, attorneys) for appellant.

Patricia A. O'Malley of counsel (Leonard Koerner, Caryn M. Hirshleifer and Elizabeth J. Logan with her on the brief; Frederick A.O. Schwarz, Jr., Corporation Counsel, attorney) for respondents.

OPINION OF THE COURT

FEIN, J.

I would affirm for the reasons stated in the careful and thoughtful opinion by Justice Louis Grossman at Special Term. However, the dissent requires additional comment.

Local Laws, 1984, No. 63, amending New York City's prohibition against invidious discrimination by clubs which are not "distinctly private" added the following definition to Administrative Code of the City of New York, § B1-2.0 (9): "An institution, club or place of accommodation shall not be considered in its nature distinctly private if it has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business. For the purposes of this section a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or the religious corporations law shall be deemed to be in its nature distinctly private."

The dissenter asserts that Local Law No. 63 offends the due process and equal protection clauses of the NY Constitution (art I, §§ 6, 11) and US Constitution 14th Amendment because it exempts from coverage certain "private" corporations incorporated under, or referred to in, the Benevolent Orders Law, the Education Law or the Religious Corporations Law. In effect, the dissent concludes that the exemptions provide for an unconstitutional "lack of equal treatment."

Benevolent orders (benevolent associations, benefit associations, fraternal or friendly societies) are statutorily recognized as organizations founded primarily for the protection or relief of their members and their dependents (Insurance Law § 4501 [a]). These societies, by their very definition, are not public. Religious corporations are defined as "created for religious purposes" (Religious Corporations Law § 2). Benevolent orders are treated differently by a number of State laws (*see, e.g.*, Education Law § 5001 [2] [e]; Civil Rights Law § 53).

There is no showing that these distinctions are constitutionally suspect.

It was long ago written: "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." (*Tigner v Texas*, 310 US 141, 147.) On the contrary, in order to pass constitutional muster, the mandate is that a legislative classification be as narrowly tailored as possible, precisely to meet constitutional limitations. The purpose is stated in *Plyler v Doe* (457 US 202, 216): "The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose."

On this basis it is clear that Local Law No. 63 does not violate the equal protection clause in defining what are "distinctly private" clubs within its compass. Nor can it be concluded that the classification and exemptions are not related to a permissible public purpose. By its terms, Local Law No. 63 is designed to bring within the City Human Rights Law's enforcement mechanism, clubs which are not private, precisely because the financial and other benefits to be derived from membership and participation in club activities regularly inure to nonmembers. However, a benevolent order has another purpose, set forth in Insurance Law § 4501 (a), as "formed, organized and carried on solely for the benefit of its members and their beneficiaries".

By statutory definition, these societies are not public. The purpose of Local Law No. 63 is solely to bring public organizations within the ambit of the City Human Rights Law.

Exemption of religious corporations is likewise justified for the purposes of Local Law No. 63. Religious Corporations Law § 2 defines a religious corporation as one "created for religious purposes." Such corporations are patently not engaged in commercial activity for the benefit of nonmembers and thus are not within the compass of the statute.

It is not without significance that religious corporations and benevolent orders are themselves subject to separate and distinct bodies of law (the Religious Corporations Law and the Benevolent Orders Law), evidencing legislative recognition that they are subject to special, albeit not always different, legislation. Thus, schools conducted by fraternal or benevolent orders are not subject to State licensing requirements (Education Law § 5001 [2] [e]). Benevolent orders are exempt from registration and filing requirements applicable to other membership and unincorporated associations (Civil Rights Law § 53). Such exemptions do not deny equal protection. In *Bryant v Zimmerman* (278 US 63, 75-76), Civil Rights Law § 53 was sustained against an equal protection challenge premised on the exclusion of benevolent orders. The statute required an oath-bound organization to file with the Secretary of State a sworn copy of its constitution, bylaws, rules, regulations and oath of membership, together with a roster of its members and officers. The law exempted labor unions and benevolent orders from its filing requirements. The *Bryant* court emphasized that a classification is justified when it serves a legitimate State purpose and the difference between the classes of organizations has been shown by experience and is not "purely arbitrary,

oppressive or capricious.' " (*Radice v New York*, 264 US 292, 296.)

Rostker v Goldberg (453 US 57), relied upon in the dissent, sheds limited light on our problem. That case, holding that Congress could constitutionally apply the draft registration law to men only, demonstrates that in certain circumstances a sex differentiation may be made by legislation without violation of due process or equal protection inhibitions. (Cf. *Matter of United States Power Squadrons v State Human Rights Appeal Bd.*, 59 NY2d 401, finding that the Power Squadrons, boating organizations which were not "distinctly private", had violated the law [Executive Law § 296] by excluding females from membership.)

Plaintiff's contention that the law is not one of general applicability, and is unduly burdensome to those affected, is without basis. The legislative purpose of curtailing discriminatory practice in clubs whose character and operation make them public accommodations by clearly defined standards does not violate due process or the equal protection of the law, because the definition excludes other clubs. The exemptions serve a proper legislative purpose. The procedure is plainly devised to determine whether there has been compliance. No unconstitutional burden is imposed.

The judgment of Supreme Court, New York County (Louis Grossman, J.), entered November 22, 1985, denying plaintiff's motion for summary judgment and granting defendants' cross motion for summary judgment, should be affirmed, without costs.

KUPFERMAN, J.P. (dissenting). We are all agreed that discrimination of any sort in either a place of public or private accommodation, is anathema.

The City of New York, in a narrow area, going beyond Civil Rights Act of 1964 title II (42 USC § 2000a *et seq.*) and the Human Rights Law (Executive Law § 290 *et seq.*),

has added Local Laws, 1984, No. 63 to Administrative Code of the City of New York, chapter 1, title B § B1-1.0 *et seq.*), to provide that any private exclusion will not apply for private clubs, which otherwise might be excluded from coverage, if they have more than 400 members and provide for regular meal service and "regularly receive * * * payment * * * on behalf of [a] nonmember * * * for the furtherance of trade or business." (Administrative Code § B1-2.0 [9].)

Obviously, the exception factors are designed to encompass organizations whose size or usage indicates activity which is really more public than private. (See in general, *Roberts v United States Jaycees*, 468 US 609; *Matter of United States Power Squadrons v State Human Rights Appeal Bd.*, 59 NY2d 401.)

Unfortunately, in the effort to limit discrimination, the very Local Law No. 63 is, in itself, discriminatory in that it denies equal protection to similarly situated persons. (See, *Rostker v Goldberg*, 453 US 57, 79.)

Local Law No. 63 provides: "For the purposes of this section a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or the religious corporations law shall be deemed to be in its nature distinctly private."

The Benevolent Orders Law lists a large number of organizations with substantial membership and eating facilities, which would, accordingly, be exempt, even though they would otherwise be in the category that should be subjected to a nondiscrimination clause. (See, *Roberts v United States Jaycees*, *supra*.)

The due process and equal protection clauses of the NY Constitution, article I, § 11 and US Constitution 14th

Amendment, being violated by the lack of equal treatment, Local Law No. 63 must be found unconstitutional.

SULLIVAN and ROSS, JJ., concur with FEIN, J.; KUPFERMAN, J.P., dissents in an opinion.

Judgment, Supreme Court, New York County, entered on November 22, 1985, affirmed, without costs and without disbursements.

At a Special Term, Part I, of the Supreme Court, State of New York held in and for the County of New York at 60 Centre Street New York, New York, on the 19th day of November, 1985.

P R E S E N T:

Hon. Louis Grossman, Justice

Index No.
25028/84

NEW YORK STATE CLUB ASSOCIATION, INC.,
Plaintiff,
-against-

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF
NEW YORK, THE CITY HUMAN RIGHTS COMMISSION AND
THE MEMBERS OF THE CITY HUMAN RIGHTS COMMISSION,
Defendants.

ORDER & JUDGMENT

The plaintiff, New York State Club Association, Inc., by its attorneys Phillips, Nizer, Benjamin, Krim & Ballon, having duly moved for an Order pursuant to CPLR 3212 declaring Local Law 513-A unconstitutional and enjoining defendants from enforcement thereof and defendants, The City of New York, The Mayor of the City of New York, the City Human Rights Commission and the Members of the City Human Rights Commission, by their attorney, Corporation Counsel of the City of New York, having opposed this Motion and having duly cross-moved for an Order pursuant to CPLR 3212 declaring Local Law 513-A constitutional, and said Motion and Cross-Motion having regularly come on to be heard,

Now, upon reading and filing the Notice of Motion dated April 17, 1985, the Affidavit of Walter S. de la Plante, sworn to on April 16, 1985 and the exhibits annexed thereto, in support of the Motion, Defendants' Notice of Cross-Motion, dated May 24, 1985, the Affirmation of Caryn M. Hirshleifer, Esq., dated May 24, 1985 and the Supplemental Affirmation of Patricia A. O'Malley, dated May 24, 1985 and the exhibits annexed thereto, in support of the Cross-Motion, the Summons, Complaint and Answer heretofore served herein, the Decision of the Hon. Louis Grossman, dated October 28, 1985, and upon submission of the foregoing, and after due deliberation having been had thereon,

Now upon motion of Phillips, Nizer, Benjamin, Krim & Ballon, attorneys for plaintiff, New York State Club Association, Inc., it is

ORDERED that the Motion for Summary Judgment is denied and the Cross-Motion is granted and it is further

ADJUDGED AND DECLARED that Local Law 513-A is constitutional.

Enter,

JSC

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : SPECIAL TERM PART I**

Index No. 25028/84

#178 of 7/3/85

NEW YORK STATE CLUB ASSOCIATION, INC.,
Plaintiff,
-against-

**THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF
NEW YORK, THE CITY HUMAN RIGHTS COMMISSION AND
THE MEMBERS OF THE CITY HUMAN RIGHTS COMMISSION,**
Defendants.

LOUIS GROSSMAN, J.:

This is a declaratory judgment action which seeks a determination that Local Law 513-A, recently enacted by the City Council of New York, outlawing discriminatory practices of certain private clubs, is invalid and unconstitutional.

Plaintiff moves for summary judgment declaring Local Law 513-A unconstitutional as an infringement of the rights of privacy, association, free speech, due process and equal protection and an unlawful bill of attainder. Plaintiff also seeks a ruling that the statute is invalid, as an improper exercise of local legislative powers to the extent that it contravenes State Law and is otherwise inconsistent with the State Human Rights Law, Executive Law Section 292. Defendants cross-move for summary judgment dismissing the complaint. In essence, the cross-motion really seeks a declaration that Local Law 513-A is a constitutional and valid exercise of the City police powers in the area of civil rights.

A declaratory judgment is a discretionary remedy. (*Barber v. City of Rochester* 246 N.Y. 140). It serves to quiet or stabilize uncertain or disputed jural relations as to present or prospective obligations. (*James v. Aldeston Dock Yards, Ltd.*, 256 N.Y. 298; *New York Public Interest Research Group, Inc., v. Carey* 42 N.Y.2d 527). Such an action is the proper vehicle for testing the constitutionality of a legislative enactment. (*Board of Education of Belmont Central School District v. Gootnick*, 49 N.Y.2d 683) or to review the validity or meaning of a statute. (*King v. Power Authority of the State of New York*, 44 A.D.2d 74, *aff'd*, 38 N.Y.2d 756). There must be a justiciable controversy. (*Board of Cooperative Educational Service v. Goldin*, 38 A.D.2d 267). To this end, the Court finds that the plaintiff, an organization consisting of many private clubs affected by and subject to the legislation has standing to sue and the legislation has an immediate practical effect on the conduct of plaintiff's members. Thus, the controversy is ripe for adjudication and dismissal of the complaint is unwarranted. A declaration of the respective rights of the parties is required. The facts are undisputed and pure questions of law are presented so that this matter may be summarily determined.

Local Law 513-A amends Section B-1-2.0(a) of the Administrative Code, the New York City Human Rights Law. The Human Rights Law prohibits discrimination based on race, creed, color, national origin or sex in the use of public accommodations. Any institution, club, or place of accommodation that is in its nature distinctly private is excluded from complying with the statutes. The amendment by Local Law 513-A requires those seeking exemption to prove they are distinctly private and provides specifically that "an institution, club, or place of accommodation shall not be considered in its nature distinctly private if it has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or

beverages directly or indirectly from or on behalf of non-members for furtherance of trade or business."

The new legislation was passed after lengthy hearings. The City Council expressed their legislative purpose in enacting the measure as follows:

Section one. Legislative Declaration. It is hereby found and declared that the City of New York has a compelling interest in providing its citizens an environment where all persons, regardless of race, creed, color, national origin or sex, have a fair and equal opportunity to participate in the business and professional life of the city, and may be unfettered in availing themselves of employment opportunities. Although city, state and federal laws have been enacted to eliminate discrimination in employment, women and minority group members have not attained equal opportunity in business and the professions. One barrier to the advancement of women and minorities in the business and professional life of the city is the discriminatory practices of certain membership organizations where business deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed.

While such organizations may avowedly be organized for social, cultural, civic or educational purposes, and while many perform valuable services to the community, the commercial nature of some of the activities occurring therein and the prejudicial impact of these activities on business, professional and employment opportunities of minorities and women cannot be ignored.

The Council recognizes the interest in private association asserted by club members. However, the Council finds that this interest does not over-

come the public interest in equal opportunity. Because small clubs, benevolent orders and religious corporations have not been identified in testimony before the Council as places where business activity is prevalent, the Council has determined not to apply the requirements of this local law to such organizations. However, the Council finds that business activity often occurs at clubs having more than four hundred members which provide regular meal service allowing persons to discuss business. The dues and expenses of members at such organizations are often paid by their employers, because the employee's activities at the organization help to develop the employer's business. The organizations also rent their facilities through members for use as conference rooms for business meetings attended by non-members. Organizations where such practices occur provide benefits to business entities and persons other than members and thus are not in fact "distinctly private" in their nature. For this reason, the Council has determined to apply the human rights law to organizations which have more than four hundred members, provide regular meal service and regularly receive payment for dues, fees, use of space, facilities, services, meals or beverages from or on behalf of non-members for the furtherance of trade or business.

It is not the Council's purpose to dictate the manner in which certain private clubs conduct their activities or select their members, except insofar as is necessary to ensure that clubs do not automatically exclude persons for consideration for membership or enjoyment of club accommodations and facilities and the advantages and privileges of membership, on account of invidious discrimination. Nor is it the Council's purpose to

interfere in club activities or subject club operations to scrutiny beyond what is necessary in good faith to enforce the human rights law.

There is a strong presumption of the constitutionality of a statute. (*Lighthouse Shores v. Town of Islip*, 41 N.Y.2d 7). While the presumption is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt. (*Netleton Co. v. Diamond*, 27 N.Y.2d 182; *Matter of Malpica-Orsini*, 36 N.Y.2d 568). Upon examination of each of plaintiff's objections to the statute, the Court finds that this heavy burden has not been met.

Plaintiff contends that the right to privacy of its constituent clubs is violated by this statute that looks into the clubs fundings and memberships. The Constitution does not explicitly mention any right of privacy. (*Carey v. Population Services International*, 431 U.S. 678). The Supreme Court, however, has recognized that one aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment is a "right of personal privacy or a guarantee of certain zones of privacy." (*Roe v. Wade*, 410 U.S. 113, 132). The right of privacy does entail the right to make decisions concerning "highly personal relationships without undue government intrusion." (*Zabloski v. Redhail*, 434 U.S. 374, 385-386). The personal affiliations that exemplify the relationship that are contemplated within the constitutional zone of privacy are those attendant to the creation and sustenance of the family. (*Roberts v. United States Jaycees* — U.S. —, 104 S.Ct. 3244, 3250) and cases cited therein. Family relationships, as noted in *Roberts*, "by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctively personal aspect of one's life." *id.* Such relationships are characterized by relative smallness of the group, a high degree of selectivity to begin and maintain

affiliation and seclusion from other critical aspects of the relationship.

The clubs affected by this legislation must have a membership of over 400 individuals. Such number is not small, nor can it be viewed as exclusive. (See *Roberts v. United States Jaycees*, *supra*). Moreover, the statute requires that the clubs receive revenues from nonmembers for the conduct of a trade or business. This commercial activity generating revenue from outsiders further undermines the claim of exclusivity.

When intimate relationships, such as family and marriage, are involved, the constitutional right to privacy is implicated and these matters may only be regulated when the state demonstrates compelling subordinating interest that cannot be satisfied by less obtrusive means. (*Carey v. Population Service International*, *supra*). The clubs at which the statute is aimed are not the type of institutions contemplated for protection under the penumbra of privacy envisioned by the Supreme Court. They lack the degree of intimacy normally associated with such right. Thus, the test is whether the regulated conduct is reasonably related to a legitimate state interest (*Village of Belle Terre v. Boraas*, 416 U.S.). The City's interest in protecting its citizenry from the serious social and personal harms resulting from invidious discrimination is not merely legitimate, it is compelling. (*Roberts v. United States Jaycees*, *supra*). Discrimination based on archaic and overbroad assumptions and stereotypes about the relative needs and capacities of certain groups deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic and cultural life. (*Heckler v. Matthews* — U.S. — 104 S.Ct. 1387, 1393).

Plaintiff claims that the statute infringes upon its members rights to freely associate. Like the right of privacy, the right of association is not explicitly set forth in the Constitution. (*Roberts v. United Jaycees*, *supra*). The right

of association subsumes the fundamental liberty to enter into and maintain certain intimate human relationships, i.e., those protected by the right of privacy. (*Prince v. Society of Sisters*, 268 U.S. 510).

In addition, the right of association is deemed implicit in the First Amendment as a necessary concomitant to the exercise of First Amendment freedoms of speech, assembly and religion. (See *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 907, 909). The right, however, is not absolute and infringement may be justified to regulate matters of compelling state interest that cannot be achieved through means significantly less restrictive. (*Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 91-92).

While so-called "private discrimination" may be characterized as a form of freedom of association or expression under the First Amendment "the Constitution places no value on it" (*Norwood v. Harrison*, 413 U.S. 455, 470) and plaintiff and its constituent members are not entitled to affirmative protection to further their discriminatory practices. (*Power Squadrons v. Appeal Board*, 59 N.Y.2d 401, 414).

Indeed, the public accommodations statutes have been in existence for more than a century. (*Roberts v. United States Jaycees*, *supra*). The New York State statute, Executive Law Article 15 dates back to 1951. (Laws 1951 Chapter 800). The state's interest in insuring equal access and opportunities to its citizenry has long found acceptance in our courts. *Civil Rights Cases* 109 U.S.3; *Heart of Atlanta Motel v. United States*, 374 U.S. 241). The scope and coverage of such legislation has been constantly expanding to accommodate the changing nature of the American economy and of the importance both to the individual and to society, of removing the barriers to economic development and political and social integration that have historically plagued certain disadvantaged groups. (See Cal-

ifano v. Webster, 430 U.S. 313; *Frontiero v. Richardson*, 411 U.S. 677). As indicated above, the City's enactment explicitly recognizes the need to correct more subtle, yet still potentially harmful forms of discriminatory conduct. It clearly acknowledges their public import, character and danger and prohibits the continuation of such practices.

As previously noted "invidious discrimination in the distribution of publicly available goods, service and other advantages causes unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection." (*Roberts v. United States Jaycees*, supra at 104 S.Ct. 3255) See also, *Runyon v. McCrary*, 427 U.S. 160, 175-176).

This statute is narrowly drawn. The 400 membership requirement appears to be derived from *Roberts v. United States Jaycees* case which found a 400-450 membership not sufficiently small or exclusive to warrant protection. The inclusion of commercial activity as a criteria fits squarely within the concepts and guidelines laid down in *Power Squadrons v. Appeal Board*, supra and *Roberts*. The City statute, in prohibiting discriminatory practices, responds precisely to the substantive problem, which legitimately concerns it and abridges no more speech or associational freedom than is necessary to accomplish its purpose. (See *City Council v. Taxpayers for Vincent*, U.S. 104 S. Ct. 2118).

Plaintiff challenges Local Law 513-A as void for vagueness and overbreadth. It is claimed that certain terms employed in the statute to delineate the conduct proscribed are so ambiguous that they cannot readily be ascertained. The terms in question are "members", "regularly provides meals", "regularly receives payment directly or indirectly

from non-members" and "in furtherance of trade or business".

As noted in *Grayned v. City of Rockford*, 408 U.S. 104 "it is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not closely defined." The degree of clarity required will depend on various considerations including whether the enactment provides for civil or criminal penalties (*Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489) or whether the law infringes on constitutionally protected rights. (cf. *Members of City Council v. New York v. Ferber* 458 U.S. 747, 769-71). Thus, laws that subject an individual to criminal penalties must be more precise than statutes that result in only civil sanctions. (*Village of Hoffman Estates v. Hoffman Estates, Inc.*, supra). Greater specificity is likewise required where laws infringe upon constitutionally protected rights (*Broadrick v. Oklahoma*, 413 U.S. 601). In any event, absolute precision in drafting laws is not mandated by either the federal or state constitutions. (*United States v. Petrillo*, 332 U.S. 7; *People v. Cruz*, 48 N.Y.2d 419, 424). Here, Local Law 513-A imposes only a civil penalty and, as indicated above, does not impinge on constitutionally protected rights.

Due Process requires that a statute by its terms give fair notice of an ascertainable standard of guilt adequate to enable persons of ordinary intelligence to avoid conduct which the law prohibits (*Rose v. Locke*, 423 U.S. 48; *Winters v. New York*, 333 U.S. 507). Local 513-A satisfies this requirement. The legislature may use ordinary terms to express ideas that find adequate interpretation in everyday usage and understanding. (*People v. Illardo*, 48 N.Y.2d, 408).

The comparable provision of the Executive Law, Section 292(a), exempts "distinctly private clubs". The instant enactment provides objective factors to be considered in determining whether a club is distinctly private. These factors

parallel the criteria set forth in *Power Squadrons v. Appeal Board*, *supra* and *Roberts v. United States Jaycees*, *supra*. The result is a statute that is more precise than its predecessors that have already passed constitutional muster (cf. *Power Squadrons v. Appeal Board*, *supra*; *Roberts v. United States Jaycees*, *supra*). The conduct proscribed is readily ascertainable by men and women of ordinary intelligence and this challenge based on vagueness and overbreadth cannot stand.

Plaintiff also claims that Local Law 513-A is an unconstitutional denial of equal protection insofar as it explicitly exempts benevolent orders and religious corporations.

Under Local Law 513-A, benevolent orders and religious corporations are deemed to be "distinctly private". The Legislative declaration indicates that "because small clubs, benevolent orders and religious corporations have not been identified in testimony before the Council as places where business activity is prevalent, the Council has determined not to apply the requirements of this local law to such organizations".

A statute will not offend the Equal Protection Clause if it is rationally related to a permissible public purpose. (*Plyler v. Doe*, 457 U.S. 202, 216). As previously noted, the statute serves a permissible public purpose; namely, the curtailment of invidious discrimination. Such purpose is a proper exercise of the State's police powers. (*Jones v. Alfred H. Mayer Co.*, 292 U.S. 409); *State Commission for Human Rights v. Kennelly*, 30 A.D.2d 310, *aff'd*, 23 N.Y.2d 722).

Local Law 513-A is tailored to attack a specific type of discriminatory practice in the business world. After hearings, the legislature found that benevolent orders and religious corporation were not implicated in the commercial activity that was to be regulated so that there would be no reason or purpose for their inclusion. As the Supreme Court noted in *Plyler v. Doe*, *supra*, at 216 "The initial

discretion to determine what is 'different' and what is 'the same' resides in the Legislatures of the States. A Legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns, both public and private and that account for limitations on the practical ability of the State to remedy every ill." That is precisely what occurred in this instance.

Religious corporations and benevolent orders by their statutory definitions are not engaged in commercial activity for the benefit of nonmembers. (See Insurance Law, Section 4501(a); Religious Corp. Law, Section 2). Their organization activities are directed towards their own members. Moreover, these groups have always received different treatment as evidenced by the distinct bodies of law enacted for their benefit. (Religious Corporations Law and the Benevolent Orders Law) and exemptions from other statutes. (e.g. Education Law Section 5001(e); Civil Rights Law Section 53). Moreover, their inclusion in a statute is not required under the doctrine of equal protection where such inclusion did not further state interests. (cf. *Bryant v. Zimmerman*, 278 U.S. 63, 75-76). The Legislative findings bear out that no state interest would be served, and, therefore, the statute works no denial of equal protection.

Plaintiff also claims a denial of equal protection in enforcement. There has been to date no enforcement measures taken under the statute. Thus a claim of discriminatory enforcement is, therefore, premature.

Plaintiff asserts that Local Law 513-A is not a statute of general applicability, but rather is aimed at its members with intent to inflict punishment by restricting their constitutional rights of privacy, speech and association without the protection of a judicial trial, and, as such, constitutes a bill of attainder prohibited by Article I Section 10 of the Federal Constitution.

Legislation, no matter what the form, that applies either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder. (*United States v. Lovett*, 328 U.S. 303, 315-316; *United States v. Brown*, 331 U.S. 437).

As noted above, plaintiff has no constitutional protected rights to engage in invidious discrimination. No restriction on liberty guaranteed by the Constitution is presented and, consequently, there is no punishment inflicted on the group.

To the extent that plaintiff is asserting that the law is not one of general applicability and is unduly burdensome to those affected, it merely paraphrases an equal protection claim. The prohibition against bills of attainder was not intended to serve as a variant of the equal protection doctrine (*Nixon v. Administrator of General Services*, 433 U.S. 425, 470-471).

Furthermore, the Court must examine whether the burdens imposed can reasonably be said to further non-punitive legislative purposes. (*Nixon v. Administrator of General Services*, *supra*, 475-476). The instant Legislation was enacted to curtail discriminatory practices in clubs whose character and operation make them public accommodations. The laudatory goal of outlawing invidious discrimination is a compelling state interest that negates punitive intent.

The statute sets up a scheme of hearings and appeal before a violation is conclusive. As such, the judicial machinery is in place for a club to challenge the administrative determination. The statute is not in essence self-executing. It requires the implementation of long-standing procedures to insure that charges are properly adjudicated.

Lastly, plaintiff maintains that Local Law 513-A is inconsistent with the State Human Rights Law and the Con-

stitution of New York State, and is, therefore, an invalid exercise of the Legislative function.

Under the "home rule" provision of the New York State Constitution a municipality is granted the power to adopt local laws. Such local laws must relate to a municipality's "property, affairs or government" provided that the local legislation is not inconsistent with the Constitution or any general law (N.Y. Const. Art 9 §2(c) or to the "government, protection, order, conduct, safety, health and well-being of persons or property therein" except "to the extent that the Legislature shall restrict adoption of such a Local Law" (N.Y. Const. Art 9 §2(c)(10)). The Municipal Home Rule Law, Section 10(1)(ii)(a)(11), as well as the police power provision of New York City Charter, Section 27(a) 1, echo the grant of powers to municipalities to enact and amend local laws. (See *People v. Cook*, 34 N.Y.2d 100, 105).

A local law will not be struck down on the basis of preemption unless it is inconsistent with the State Constitution or any general law or unless it regulates in an area where the State Legislature has evidenced an intent to preempt the field. (*Ames v. Smoot*, 98 A.D.2d 216).

A local law may involve matters addressed in State Legislation. The mere coincidence of subject matter will not automatically invalidate the local law. (*People v. New York Trap Rock Corp.*, 57 N.Y.2d 371, 378; *People v. Judiz*, 38 N.Y.2d 529). Only where the State Legislature "expressly or impliedly has evinced an unmistakable desire to avoid the possibility that the local legislation will not be on all fours with that of the State" is the municipality then without authority to act. (*People v. New York Trap Rock Corp.*, 57 N.Y.2d 371, 378; *Monroe Livingston Sanitary Landfill v. Caledonia*, 51 N.Y.2d 679). Such intention may be implied from the language of the statute, the nature of the subject matter being regulated and purpose and scope of the State Legislation and regulatory scheme

then in existence. (*Consolidated Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99).

The Executive Law Article 15, the Human Rights Law, does not expressly reserve to the State exclusive power to legislate in this area. Examining the nature of the subject matter being regulated, the legislative purpose to be served and its scope, no implication of exclusive jurisdiction can be drawn.

Executive Law Section 290(3) states its purpose as "to insure that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the state; . . . to eliminate and prevent discrimination in employment, in places of public accommodation." This policy has been implemented not only through the enforcement of State Law by the State Division of Human Rights and the Courts, but also through local commissions on human rights as authorized by General Municipal Law Section 239-S. These statutes demonstrate consistent legislative intent to establish a complimentary scheme of state and local regulation of this area.

Indeed, the State has acknowledged that municipalities may legislate in this area of human rights. (*See* 1978 Atty. Gen. Op. 115; 1968 Atty. Gen. Op. 98). The Courts which have considered this question have likewise determined that the State Legislature had not intended to preclude local legislation in the regulation of discrimination in public accommodations. (*See City of New York v. Claflington*, 40 Misc. 2d 547; *Fleigenbaum v. Commission on Human Rights of the City of New York*, 53 Misc.2d 360).

A local law is inconsistent with State statute so as to be preempted if it allows what State law prohibits or forbids what state law permits. (*People v. Lewis*, 295 N.Y. 42; *Wholesale Laundry Board v. City of New York*, 17 A.D.2d 327, *aff'd*, 12 N.Y.2d 998. Inconsistent, however, should not be construed to mean different for such result

"would vitiate the flexibility of home rule". (*Town of Clifton Park v. C.P. Enterprises*, 45 A.D.2d 96, 98. It is toward local laws that contradict or are incompatible or inharmonious with the general laws of the state that doctrine inconsistency is addressed.

Local Law 513-A does not allow what the State forbids or prohibit what the state permits. It uses the State Law term "distinctly private club" and applying the criteria enumerated in *Power Squadrons v. State Board*, *supra*, sets forth certain objective tests that will satisfy the factors enunciated by the Court of Appeals. These tests give indicia as to whether an organization is exclusive, selective, publicly oriented and commercial. All these factors are relevant to determining whether an organization is a public accommodation or distinctly private club and in accord with the existing standards under State and Federal law. (*Power Squadrons v. Appeal Board*, *supra*; *Roberts v. United States Jaycees*, *supra*).

Plaintiff asserts that the local law shifts the burden of proof to the club claiming exemption. This view is a complete misreading of the applicable case law. In *Power Squadrons*, the Court of Appeals clearly stated that the burden is on the party claiming the exemption. (*Power Squadrons v. Appeal Board*, *supra* at 412). There is no shift in the burden of proof and the local law is completely consistent with the State Human Rights Law in this regard. Thus, there is no intended preemption or inconsistency which would render the statute constitutionally defective or invalid.

All of plaintiff's objections and challenges to the local law having been found to be without merit the defendant is entitled to summary judgment declaring the local law constitutional and valid.

Accordingly, the motion by plaintiff for summary judgment declaring the statute unconstitutional and invalid is denied. The cross-motion dismissing the complaint is

granted only to the extent of finding summary judgment in favor of defendants and declaring the statute constitutional and valid.

Settle order.

Dated: October 28, 1985.

J. S. C.

**STATE OF NEW YORK
COURT OF APPEALS**

**New York County
Clerk's Index No. 25028/84**

NEW YORK STATE CLUB ASSOCIATION, INC.,
Plaintiff-Appellant,
-against-

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF
NEW YORK, THE CITY HUMAN RIGHTS COMMISSION AND
THE MEMBERS OF THE CITY HUMAN RIGHTS COMMISSION,
Defendants-Respondents.

**NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES**

Notice is hereby given that New York State Club Association, Inc., the above-named appellant, hereby appeals to the Supreme Court of the United States from the opinion and order of the Court of Appeals of the State of New York entered in this action on February 17, 1987, which affirmed the final judgment of the Supreme Court, State of New York, entered on November 22, 1985.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON

By: /s/ ALAN MANSFIELD
ALAN MANSFIELD
Counsel for Plaintiff-Appellant
40 West 57th Street

New York, NY 10019
(212) 977-9700

TO: Mr. Donald Sheraw
Clerk
Court of Appeals of the State of New York
20 Eagle Street
Albany, NY 12207
(518) 455-7700

Mr. James Andres
Clerk
Supreme Court of the State of New York,
New York County
60 Centre Street
New York, New York 10007
(212) 374-4585

PETER L. ZIMROTH
Corporation Counsel of the City of New York
Counsel for Defendants-Respondents
100 Church Street
New York, NY 10007
(212) 566-3927

STATE OF NEW YORK
COURT OF APPEALS

AFFIDAVIT OF SERVICE

New York County
Clerk's Index No. 25028/84

NEW YORK STATE CLUB ASSOCIATION, INC.,
Plaintiff-Appellant,
-against-

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF
NEW YORK, THE CITY HUMAN RIGHTS COMMISSION AND
THE MEMBERS OF THE CITY HUMAN RIGHTS COMMISSION,
Defendants-Respondents.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ALAN MANSFIELD, being duly sworn, deposes and
says:

1. I am over the age of eighteen years and am not a
party to the above-captioned action.

2. I am a member of the law firm of Phillips, Nizer,
Benjamin, Krim & Ballon of 40 West 57th Street, New
York, New York 10019.

3. On the eleventh day of May, 1987, I served the within
NOTICE OF APPEAL TO THE UNITED STATES
SUPREME COURT on the interested parties in the above-
captioned proceeding by placing a true copy thereof en-
closed in a sealed envelope with postage thereon fully pre-
paid in the United States mail at a Post Office Box
regularly maintained by the United States Postal Service
in New York, New York to each of the following:

Mr. Donald Sheraw
Clerk

Court of Appeals of the State of New York
20 Eagle Street
Albany, NY 12207
(518) 455-7700

Mr. James Andres
Clerk

Supreme Court of the State of New York,
New York County
60 Centre Street
New York, New York 10007
(212) 374-4585

Peter L. Zimroth
Corporation Counsel of the City of New York
Counsel for Defendants-Respondents
100 Church Street
New York, NY 10007
(212) 566-3927

/s/ ALAN MANSFIELD
ALAN MANSFIELD

Sworn to before me this
11th day of May, 1987

/s/ DAVID JACOBY
DAVID JACOBY
Notary Public

David Jacoby
Notary Public, State of New York
No. 31-4707068
Qualified in New York County
Commission Expires March 30, 1989

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This direct appeal challenges the constitutionality of New York City Local Law 63 principally under the first and fourteenth amendments to the United States Constitution.

The first amendment provides in pertinent part that

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The fourteenth amendment provides in pertinent part that

[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York City Local Law 63 amended New York City's public accommodations law, Administrative Code of the City of New York ("Administrative Code"), Title 8 §§ 8-101 *et seq.*, and provides in pertinent part that:

The term "place of public accommodation, resort or amusement" shall include . . . all places included in the meaning of such terms as: inns, taverns, road houses, hotels, motels Such term shall not include . . . any institution, club or place of accommodation that is in its nature distinctly private. *An institution, club or place of accommodation shall not be considered in its nature distinctly private if it has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages*

directly or indirectly from or on behalf of non-members for the furtherance of trade or business. For the purposes of this section a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or the religious corporations law shall be deemed to be in its nature distinctly private.

Administrative Code, Title 8 § 8-102(9) (Local Law 63 in italics).

The public accommodations law further provides that

§ 8-107. It shall be an unlawful discriminatory practice for any person being the owner, lessee, proprietor, manager superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin or sex of any person directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof

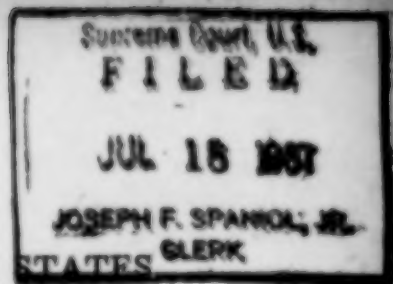
§ 8-108 Unlawful discriminatory practices—the handicapped. The provisions heretofore set forth in section 8-107 as unlawful discriminatory practices shall be construed to include an otherwise qualified person who is physically or mentally handicapped.

§ 8-108.1 Unlawful discriminatory practices; sexual orientation. 1. The provisions heretofore set forth in section 8-107 as unlawful discriminatory practices shall be construed to include discrimination against individuals because of their actual or perceived sexual orientation.

MOTION

2
No. 86-1836

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987



NEW YORK STATE CLUB ASSOCIATION, INC.,

Appellant,

-against-

THE CITY OF NEW YORK, THE MAYOR OF THE
CITY OF NEW YORK, THE CITY HUMAN RIGHTS
COMMISSION and THE MEMBERS OF THE CITY
HUMAN RIGHTS COMMISSION,

Appellees,

ON APPEAL FROM THE NEW YORK STATE COURT
OF APPEALS

MOTION TO DISMISS OR AFFIRM

PETER L. ZIMROTH
Corporation Counsel for
the City of New York,
Attorney for Appellees,
100 Church Street,
New York, NY 10007.
(212) 566-4338 or
566-3927

LEONARD J. KOERNER,
PATRICIA A. O'MALLEY,
Of Counsel.

July 17, 1987

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

NEW YORK STATE CLUB ASSOCIATION,
INC.,

Appellant,

-against-

THE CITY OF NEW YORK, THE MAYOR OF
THE CITY OF NEW YORK, THE CITY
HUMAN RIGHTS COMMISSION and THE
MEMBERS OF THE CITY HUMAN RIGHTS
COMMISSION,

Appellees,

ON APPEAL FROM THE NEW YORK STATE
COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

STATEMENT

Appellees move to dismiss appellant's
appeal or, in the alternative, to affirm the
final order of the Court of Appeals of the
State of New York entered February 17,
1987. The appeal does not present a

EDITOR'S NOTE

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ISSUED.

substantial federal question. The questions
raised by appellant have twice been decided
by this Court against appellant in recent
decisions.

QUESTIONS PRESENTED

1. Whether a New York City public
accommodation antidiscrimination law that
prohibits invidious discrimination by
non-distinctly private clubs which have more
than 400 members, which regularly serve
meals, and which derive financial, business
related benefits from nonmembers of the
organization, violates constitutional privacy
and associational interests?

2. Whether the New York City
Legislature's decision after hearings to
exempt religious and benevolent organizations
from the law's coverage where these
organizations historically receive separate

legislative treatment is violative of equal protection?

FACTS

(1)

New York City and State laws prohibit invidious discrimination in places of public accommodation and exempt from their coverage "distinctly private" places.¹ Neither statute, until recently, defined the term "distinctly private." Despite the absence of statutory definition, the Court of Appeals of the State of New York confirmed the very limited reach of the "distinctly private" exception to the State's policy against invidious discrimination.²

¹ N.Y. Exec. Law §§ 292(9), 296(2) (McKinney 1982); N.Y.C. Admin. Code §§ 8-102(9), -107(2).

² United States Power Squadrons v. State Human Rights Appeal Board, 59 N.Y.2d 401, 409-15, 452 N.E.2d 1199, 1202-05 (1983).

Consistent with New York State law and articulated legislative policy,³ the New York City public accommodation antidiscrimination law was amended by Local Law 63 of 1984⁴ to provide criteria for determining whether a place of accommodation is "distinctly private":

[a]n institution, club or place of accommodation shall not be considered in its nature distinctly private if it has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, uses of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business (45a).⁵

³ See N.Y. Exec. Law § 290(3) (McKinney 1982); N.Y.C. Admin. Code § 8-101.

⁴ Local Law 63 was adopted by the New York City Legislature, the City Council, by a vote of 31 to 1 and signed into law by the Mayor of the City of New York on October 24, 1984.

⁵ Parenthetical references, unless otherwise
(Footnote Continued)

The New York City Council held extensive hearings on the subject before the law was enacted.⁶ Testimony before the

(Footnote Continued)

noted, are to the Appendix accompanying appellant's Jurisdictional Statement.

⁶ The testimony taken by the City Council is a matter of public record. Testimony was submitted in support of the law by individuals and organizations including the Mayor of the City of New York, the Attorney General of the State of New York, the NAACP, the American Bar Association, and the New York City Civil Liberties Union. Appellant and amicus curiae, the Conference of Private Organizations, gave evidence in opposition to the law. Section one of appellees' Statement of Facts is taken from testimony given before the City Council by the following individuals: Paula Omansky (New York County Lawyers Association), Andrew Stein (Manhattan Borough President), Ruth Barcan Marcus (American Academy of Arts and Sciences), Margaret Boepple (City University of New York), Judith Avner (NOW), Robert Abrams (Attorney General of the State of New York), Congresswoman Geraldine Ferraro, Carol Bellamy (New York City Council President), Isalah E. Robinson, Jr. (New York City Commission on Human Rights), Janet Studley (American Bar Association),
(Footnote Continued)

Council demonstrated that certain membership organizations and clubs in the City of New York function as meeting grounds for high-level business people and professionals. Club facilities are used for luncheon and dinner business meetings with clients and colleagues. The clubs are useful for these purposes because the dining atmosphere in these places is especially conducive to business meetings. These places afford the opportunity and provide an environment for the discussion of business and enable participating individuals to develop valuable professional contacts that further their careers and open doors to other employment opportunities. Indeed, actual business

(Footnote Continued)

Jack Greenberg (NAACP), Lynn Schafran (New York City Commission on the Status of Women).

transactions and "deals" are formulated and consummated in these places.

A former president of the National Club Association characterized club membership as "vital" to individuals with career aspirations in business and as "disadvantaged" those excluded from membership. This contention was confirmed by the president of one New York City club, in a letter written to urge club members to admit women:

To exclude women would discriminate against them, particularly career women, because they would be denied the opportunity to broaden their acquaintances and to participate in political, business and professional discussions that are fostered in a club such as ours.

The City Council was informed that dues and expenses for membership in City clubs are often paid for by the members' employers, either directly or through reimbursement or expense accounts, and are

often earmarked as business-related and tax deductible items for income tax purposes. The National Club Association estimated that 37% of its members dues are paid directly by businesses. One City club conservatively estimated that 50% of its dues and fees derive from employers.

New York City clubs also regularly hold formal business gatherings. Clubs provide rooms for a fee for business-related social events (such as office Christmas parties) and for business conferences and meetings. Examples provided to the City Council of functions held at New York City clubs included meetings for creditors of Braniff Airline, the Executive Committee of the Republican Party, and the Association of the Democratic State Treasurers. One New York City club estimated that this source of club revenues amounted to over one million

dollars, a significant percentage of the club's total income.

In enacting Local Law 83, the City Council set forth a Legislative Declaration describing the purpose for the amendment to the Code and setting forth the reasons for the City Council's findings that organizations covered by the law are not "distinctly private" and thus not exempt from public accommodation antidiscrimination laws:

Legislative Declaration: It is hereby found and declared that the City of New York has a compelling interest in providing its citizens an environment where all persons, regardless of race, creed, color, national origin or sex, have a fair and equal opportunity to participate in the business and professional life of the City, and may be unfettered in availing themselves of employment opportunities. Although City, State and Federal laws have been enacted to eliminate discrimination in employment, women and minority group members have not attained equal opportunity in business and the professions. One barrier to the advancement of women and minorities in the business and

professional life of the City is the discriminatory practices of certain membership organizations where business deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed.

While such organizations may avowedly be organized for social, cultural, civic or education purposes, and while many perform valuable services to the community, the commercial nature of some of the activities occurring therein and the prejudicial impact of these activities on business, professional and employment opportunities of minorities and women cannot be ignored.

The Council recognizes the interest in private association asserted by club members. However, the Council finds that this interest does not overcome the public interest in equal opportunity. Because small clubs, benevolent orders and religious corporations have not been identified in testimony before the Council as places where business activity is prevalent, the Council has determined not to apply the requirements of this local law to such organizations. However, the Council finds that business activity often occurs at clubs having more than four hundred members which provide regular meal service allowing persons to discuss

business. The dues and expenses of members at such organizations are often paid by their employers, because the employee's activities at the organization help to develop the employer's business. The organizations also rent their facilities through members for use as conference rooms for business meetings attended by nonmembers. Organizations where such practices occur provide benefits to business entities and persons other than members and thus are not in fact "distinctly private" in their nature. For this reason, the Council has determined to apply the human rights law to organizations which have more than four hundred members, provide regular meal service and regularly receive payment for dues, fees, use of space, facilities, services, meals or beverages from or on behalf of nonmembers for the furtherance of trade or business.

It is not the Council's purpose to dictate the manner in which certain private clubs conduct their activities or select their members, except insofar as is necessary to ensure that clubs do not automatically exclude persons from consideration for membership or enjoyment of club accommodations and facilities and the advantages and privileges of membership, on account of invidious discrimination. Nor is it the Council's purpose to interfere in club activities or subject club

operations to scrutiny beyond what is necessary in good faith to enforce the human rights law.

(2)

On or about October 25, 1984, appellant, NYSCA, commenced this declaratory judgment action seeking to have Local Law 63 declared unconstitutional under both the Federal and State Constitutions. Appellant's motion for a preliminary injunction to enjoin enforcement of the local law was denied by the Supreme Court, New York County (Greenfield, J.). On March 7, 1985, the Appellate Division, First Department, affirmed the denial of the preliminary injunction.

After issue was joined appellant moved for summary judgment on the ground that Local Law 63 violates the New York State Constitution because inconsistent with the State Human Rights Law (25a). Appellees cross-moved for summary judgment as to all

of appellant's state and federal challenges to the law (*id.*). In a decision dated October 28, 1985, the Supreme Court, Special Term, New York County (Grossman, J.), denied appellant's motion for summary judgment and granted the City's cross-motion for summary judgment upholding Local Law 63 and declaring the law to be valid and constitutional (25a-45a). The Appellate Division, First Department, affirmed the judgment of Special Term for the reasons stated by the Justice at Special Term (16a-22a). On February 17, 1987, the New York Court of Appeals unanimously affirmed the order of the Appellate Division in an opinion written by Chief Judge Sol Wachtler (1a-13a).

OPINIONS BELOW

SUPREME COURT, NEW YORK COUNTY

Special Term considered each of the constitutional challenges made by appellant against Local Law 63 and found them to be without merit. Applying the principles set forth in this Court's recent decision in Roberts v. United States Jaycees, 468 U.S. 609 (1984) ("Roberts"), Special Term found that clubs covered by the local law could invoke no constitutional right of privacy to shield their discriminatory practices due to their nonintimate and commercial character (29a-30a, 39a). The City's compelling interest in eradicating discrimination and the harm caused by these practices, moreover, justified the narrowly-drawn regulation of constitutional associational interests (30a-32a).

Appellant's equal protection challenge was also dismissed by the Court. Special

Term observed that it is the legislature's province to create classes in order to resolve identified problems (34a-35a). The City Council did not find that religious corporations or benevolent orders engaged in the conduct sought to be regulated and they are otherwise statutorily distinct from covered organizations (id.).

APPELLATE DIVISION
118 A.D.2d 392
505 N.Y.S.2d 152 (1986)

The Appellate Division (Kupferman J., dissenting) affirmed the judgment of Special Term for the reasons stated by the Justice at Special Term (16a). The Court's opinion was limited to comment on the dissenting opinion regarding the local law's exemption for religious corporations and benevolent orders.

The Appellate Division noted that benevolent orders are recognized by state law as "founded primarily for the protection

or relief of their member and dependents" (17a). Religious corporations are defined by statute as "created for religious purposes" (id.). By statutory definition these groups are not within the scope of Local Law 63 which regulates organizations that are public because they provide financial benefits to nonmembers (18a-19a). The distinction in the local law, therefore, is not "constitutionally suspect", because things different in fact need not be treated similarly under the law (18a). In this regard, the Court noted, benevolent orders and religious corporations are each the subject of separate and distinct bodies of state law, thus evidencing special legislative treatment, and other legislative exemptions from general laws granted to benevolent orders have survived constitutional challenge (19a-20a).

In a dissenting opinion, Justice Kupferman articulated no objection to the legality of the local law except its exemption for benevolent orders. He found that the State Benevolent Orders Law lists organizations with large membership and eating facilities which, he opined, but for the exemption, would be covered by the law (20a-22a).

NEW YORK COURT OF APPEALS
69 N.Y.2d 211
505 N.E.2d 915 (1987)

In unanimously affirming the order of the Appellate Division, the Court of Appeals first addressed appellant's primary contention on appeal that the local law violates the State Constitution because it is inconsistent with the State Human Rights Law (4a). The Court found that the City could define for itself the term "distinctly private," although no definition was provided in the state law, in order to address

particular abuses identified by the City legislature (6a-7a). The City's definition does not conflict with the State Court of Appeals' precedent which set forth guidelines for determining whether a club is "distinctly private" (8a-11a). Those guidelines, different than the City's statutory definition, were not exclusive and, indeed, the Court noted, were derived from a federal statute which is more liberal than New York State law in defining private places (8a-10a). In this regard, the Court particularly found that selectivity, an essential characteristic of a distinctly private club, is reasonably deemed to have been lost by a club coming within the scope of Local Law 63 due to its size and public nature (9a-10a).

Applying this Court's decision in Roberts, the Court of Appeals rejected appellant's contention that Local Law 63 violates freedoms of intimate or expressive

association (11a-13a). Consistent with Roberts, the local law uses objective characteristics of a club to assess its nonintimate, public status (11a-12a). Despite appellant's contention that its member clubs were formed to espouse certain political, academic, or social ideas, the City's compelling interest in assuring women and minorities equal access to business contacts and advantages, justified the restrictive means adopted through Local Law 63 to achieve that end (12a-13a). Appellant has no right to practice invidious discrimination, the Court added, and any intrusion on appellant's free speech rights by the local law is incidental to the City's legitimate interest in extending equal employment opportunities (13a).

The Court considered appellant's other challenges to the local law and found them to be without merit (id).

ARGUMENT

THE APPEAL SHOULD BE DISMISSED FOR LACK OF A SUBSTANTIAL FEDERAL QUESTION. LOCAL LAW 63 REGULATES CLUBS WHICH MANIFEST OBJECTIVE INDICIA OF PUBLIC PLACES AS IDENTIFIED BY THIS COURT IN ROBERTS V. UNITED STATES JAYCEES, 468 U.S. 880 (1984), AND BOARD OF DIRECTORS OF ROTARY CLUB INTERNATIONAL V. ROTARY CLUB OF DUARTE, 55 U.S.L.W. 4806 (MAY 4, 1987), AND IS CONSTITUTIONAL IN ALL RESPECTS.

(1)

Appellant's argument that Local Law 63 violates constitutional privacy and associational interests was properly and summarily rejected by three New York State Courts relying on this Court's decision in Roberts. The criteria set forth in the law to assess the public nature of an organization are consistent with the factors used by this Court in Roberts and in Board

of Directors of Rotary Club International v. Rotary Club of Duarte, 55 U.S.L.W. 4808 (May 4, 1987) ("Rotary"), to reject the legitimacy of identical constitutional arguments raised against application of similar equal access laws to membership organizations. Roberts and Rotary compel the conclusion that Local Law 63 is constitutional and that no substantial federal question is presented by Local Law 63 for this Court's review.

A right of privacy or intimate association extends to relationships with "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs, but also distinctly personal aspects of one's life." Roberts, 468 U.S. at 619-20. Although not limited to family relationships, the characteristics that render a family

constitutionally intimate are used to assess whether other groups can invoke that right. Id. These can include size, a high degree of selectivity, and seclusion from outsiders in matters central to the relationship. Rotary, 55 U.S.L.W. at 4608; Roberts, 468 U.S. at 620. Local Law 63 requires an analysis of three objective club characteristics which, considered together, are inconsistent with truly private membership associations. The size and operating policies of these clubs, as three New York Courts have found, are "public" in nature and place an organization well outside the scope of constitutional intimacy.

In Roberts, this Court found that an organization with over 400 members was too large and unselective to invoke a right to intimate association. Local Law 63 applies only to clubs with more than 400 members. Clubs within the local law are also regularly

paid by nonmembers for club privileges that further their commercial interests. A club's practice of receiving funds from nonmembers for business purposes is a singularly effective and practical measure of the "public nature" of club life. The club is supported by and operated for the public, business benefit of outsiders to the organization. The club is not constitutionally selective or exclusive because, as a regular course of its business, it provides club benefits to and is financially supported by nonmembers of the organization who have never been screened or selected for membership.⁷ The

⁷ Appellant concedes that an organization's "objective characteristics, its policies and practices," and the "nature of 'club life'" (Appellant's Jurisdictional Statement at 13) should be analyzed to determine its right to constitutional privacy. Appellant erroneously reasons, however, that the local law does not assess a club's "selective membership practices" and mistakenly relies (Footnote Continued)

organization is not operated solely for the benefit of its members and, as noted by this Court in Roberts, "maintenance of the association involves the participation of strangers to the relationship." Roberts, 468 U.S. at 621. That the local law does not require a fixed percentage of club funds to derive from nonmembers is not

(Footnote Continued)

on caselaw interpreting other equal access statutes to support an argument that screening of club applicants is the most important factor to consider in determining whether a club is private (see id. at 11, 13 n.8). Although a club within the local law may carefully screen applicants, its other attributes belie a claim to constitutional selectivity. The cases cited by appellant do not construe the Constitution, but, instead, interpret statutes more liberal in their definition of a private place than that set forth by this Court in Roberts. Compare Roberts, 468 U.S. at 620, with, 42 U.S.C. §2000a(e) (1976) (prohibiting discrimination in public places and exempting "a private club ... not in fact open to the public"). See also New York State Club Association Inc. v. City of New York, 69 N.Y.2d 211, 220, 222-23, 505 N.E.2d 915, 919, 920-21 (1987).

constitutionally significant. The law assesses continuity of business practices traditionally and appropriately associated with public places. In this regard, the local law also requires that these clubs provide regular meal service. This provision of the law promotes the Legislature's purpose and is similarly consonant with traditional concepts of public accommodations.

The local law does not violate a freedom of expressive association. Clubs within the law remain free to espouse ideologies basic to their formation or existence and can freely select and exclude club members on this basis. Rotary, 55 U.S.L.W. at 4809; Roberts, 468 U.S. at 623-25. Any argument that woman, or particular ethnic or racial groups do not, by virtue of these traits, share the same club ideologies, without more, has been rejected by this Court. Roberts, 468 U.S. at 627-28. Nor does the

Constitution affirmatively protect dangerous expressive activities like the invidiously discriminatory practices appellant seeks to pursue. Id. at 628. In any event, appellant concedes that Local Law 63 serves a compelling governmental interest. The minimal intrusion upon associational rights, if any, effected by Local Law 63 is therefore constitutionally justified. Rotary, 55 U.S.L.W. at 4709; Roberts, 468 U.S. at 628.⁸

⁸ Local Law 63 does not regulate speech but merely a type of conduct found to be entitled to no constitutional protection. See Norwood v. Harrison, 413 U.S. 455, 470 (1973). This case does not present, therefore, "weighty countervailing policies" warranting the "extraordinary protection afforded by the overbreadth doctrine." New York v. Ferber, 458 U.S. 747, 769 (1982) (quoting United States v. Raines, 382 U.S. 17, 22-23 (1960)); id. at 781 (Stevens, J. concurring in the judgment). In any event, the law is not overbroad but attacks those specific evils the Legislature sought to eliminate by proscribing discrimination in
(Footnote Continued)

(2)

The exemption in Local Law 63 for benevolent orders and religious corporations does not violate the equal protection clause of the Constitution and does not present a substantial federal question for review by this Court. The Constitution does not require that things "different in fact or opinion" be treated the same and it is within the legislature's discretion to "determine what is different and what is the same." Plyler v. Doe, 457 U.S. 202, 216 (1981). The New York State Courts found that the City Legislature properly distinguished

(Footnote Continued)

clubs where business is the likely to be transacted. The local law therefore "responds precisely to the substantive problem which legitimately concerns" the City of New York, and "abridges no more speech or associational freedom than is necessary to accomplish that purpose." Roberts, 468 U.S. at 829 (quoting Members of the City Council v. Taxpayers for Vincent, 466 U.S. at 810).

between these statutorily unique groups and regulated clubs.

Under New York law benevolent orders are organizations formed primarily for the protection or relief of their members and dependents.⁹ A religious corporation is defined by statute as "a corporation created for religious purposes."¹⁰ These groups, by statutory definition, are not "public" within the meaning and intent of Local Law 63 which regulates clubs providing commercial benefits to nonmembers. The

⁹ See N.Y. Ins. Law §4501 (a) (McKinney 1985) (defining a fraternal benefit society (benevolent order) as one "formed, organized and carried on solely for the benefit of its members and of their beneficiaries").

¹⁰ N.Y. Rel. Corp. Law §2 (McKinney Supp. 1987); Johnson v. Hughes, 112 App. Div. 524, 98 N.Y.S. 415 (1st Dep't 1906), rev'd on other grounds, 187 N.Y. 446, 80 N.E. 373 (1907) (religious corporations are created for purposes of group worship or observance).

exclusion of these groups from Local Law 63 thereby promotes the Legislature's goal and satisfies the constitutional mandate that legislation be narrowly tailored. See Plyler v. Doe, 457 U.S. 202 (1981).

Special treatment for benevolent orders and religious corporations is unremarkable in New York State. Both groups are the subject of distinct bodies of state legislation, the Religious Corporations Law and the Benevolent Orders Law.¹¹ Benevolent orders, in particular, are exempt from other New York State laws.¹² In Bryant v.

¹¹ See McKinney's Consolidated Laws of New York, Book 50, Religious Corporations Law (1952 & Supp. 1987); Id., Book 5, Benevolent Orders Law (1951 & Supp. 1987).

¹² See, e.g., N.Y. Educ. Law §5001(e) (McKinney 1981) (schools conducted by benevolent orders exempt from state licensing requirements); N.Y. Civ. Rights Law §53 (McKinney 1976) (benevolent orders exempt from registration and filing)
(Footnote Continued)

Zimmerman, 278 U.S. 63 (1982), this Court upheld the disparate treatment of benevolent orders under New York law because it was assumed that the Legislature had relied upon common-sense and experience to differentiate them from other membership associations. In this regard, contrary to appellant's suggestion, there is no requirement that a statute be invalidated if the Legislature acted without a substantial evidentiary record.¹³ In Bryant there was no showing

(Footnote Continued)
requirements for membership and unincorporated associations).

¹³ After hearing extensive testimony about business practices and policies of clubs and associations within and without the City of New York, the City Council concluded that [b]ecause small clubs, benevolent orders and religious corporations have not been identified in testimony before the Council as places where business activity is prevalent, the Council has determined not to apply the requirements of this local law to such organizations.

Local Law 63 § 1 (see p. 10, supra).

that the Legislature had considered concrete facts in support of or contrary to its findings. See id. at 75-76.¹⁴ Appellant's complaint that the City legislature exempted these groups from Local Law 83 based on insufficient or conflicting evidence is therefore unavailing.

¹⁴ Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464-65 (1981), relied upon by appellant, is not to the contrary. There, this Court stated that the presentation of evidence contrary to that relied upon by the legislature in creating a classification cannot defeat the legislation. Similarly inopposite is plaintiff's citation to Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266, 277-74 (1936). There, the legislative history was entirely silent as to the reason for the classification and no reason could be found by this Court for the distinction.

CONCLUSION

**THE APPEAL SHOULD BE
DISMISSED, OR, ALTERNA-
TIVELY, THE ORDER APPEALED
FROM SHOULD BE AFFIRMED.**

July 17, 1987

Respectfully submitted,

**PETER L. ZIMROTH
Corporation Counsel of
the City of New York,
Attorney for Appellees,**

**LEONARD J. KOERNER,
PATRICIA A. O'MALLEY,
of Counsel.**

REPLY BRIEF

No. 86-1836

Supreme Court, U.S.
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AUG 12 1987

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

NEW YORK STATE CLUB ASSOCIATION, INC.,
Appellant,
v.

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF
NEW YORK, THE CITY HUMAN RIGHTS COMMISSION AND
THE MEMBERS OF THE CITY HUMAN RIGHTS COMMISSION,
Appellees.

**Appeal From the Court of Appeals
Of the State of New York**

**APPELLANT'S BRIEF OPPOSING
MOTION TO DISMISS OR AFFIRM**

ALAN MANSFIELD
Counsel of Record
ANGELO T. COMETA
LOUIS J. LEFKOWITZ
DEBRA A. ROTH
40 West 57th Street
New York, NY 10019
(212) 977-9700

Attorneys for Appellant

August 11, 1987

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APPELLANT'S BRIEF OPPOSING
MOTION TO DISMISS OR AFFIRM

Appellant, New York State Club Association, Inc. ("NYSCA"),¹ submits this brief in opposition to the City of New York, the Mayor of the City of New York, the City Human Rights Commission and the Members of the City Human Rights Commission's (collectively "the City's") motion to dismiss or affirm. For the reasons set forth below and in NYSCA's Jurisdictional Statement, the Court should deny the City's motion, note probable jurisdiction and order full briefing and oral argument on the merits.

ARGUMENT

THE APPEAL PRESENTS SUBSTANTIAL FEDERAL
QUESTIONS AFFECTING THE CONSTITUTIONAL
RIGHTS OF MEMBERS OF SELECTIVE PRIVATE
ASSOCIATIONS

The City's contention that this appeal does not present a substantial federal question is flatly refuted by Justice Powell who, speaking for a unanimous Court in *Board of Directors of Rotary International v. Rotary Club of Duarte*, — U.S. —, 55 U.S.L.W. 4606 (U.S. May 4, 1987) ("Rotary"), stated: "[W]e have no occasion in this case to consider the extent to which the First Amendment protects the right of individuals to associate in the many clubs and other entities with selective membership that

¹ Appellant's statement pursuant to Rule 28.1 is contained in the Jurisdictional Statement ("J.S.") at ii n.e.

are found throughout the country." 55 U.S.L.W. at 4609 n.6. This case squarely presents such an occasion.²

Local Law 63 by design and operation precludes selective membership associations from demonstrating their distinctly private nature for purposes of State public accommodation regulation if the associations meet a mechanistic three-prong test—a test which violates the teaching of *Rotary*. As set forth in the Jurisdictional Statement, the un rebutted factual record below demonstrates that NYSCA is composed of clubs with highly selective membership policies, many of which have organized along gender, ethnic, religious and national origin lines. More than 600,000 people in New York State are members of formal organizations which limit their membership on grounds of race, religion, sex or national origin.³ J.S. at 2, 5 n.5. The City does not dispute these facts. In addition, Local Law 63 and its progeny of similar laws which have been proposed or enacted throughout the country serve to interfere with membership policies and operations of selective private clubs and thereby intrude on the members' associational, privacy and speech rights. Accordingly, the City's contention that NYSCA's appeal fails to present a substantial federal question is without merit.

² The Court of Appeals' decision was rendered before *Rotary* was decided. Accordingly, the State courts which considered NYSCA's claims did not have the benefit of its analysis.

³ The issues presented by this appeal are of national concern. As demonstrated in the Jurisdictional Statement and the Amicus Curiae Brief of the Conference of Private Organizations ("CONPOR Brief"), municipalities throughout the country are considering or have enacted similar legislation. J.S. at 7 n.6; CONPOR Brief at 5 n.5 and 7. Since the filing of the Jurisdictional Statement, Chicago has amended Section 1 of Chapter 199A of the Municipal Code and adopted a tripartite test identical to Local Law 63. Chicago's law does not, however, exempt benevolent orders and religious corporations.

I. LOCAL LAW 63 VIOLATES NYSCA'S MEMBERS' RIGHTS OF FREEDOM OF ASSOCIATION, PRIVACY AND SPEECH.

A. The City Fails to Rebut NYSCA's Argument That Local Law 63 Violates the Right to Freedom of Intimate Association.

The City misapprehends the *Rotary* opinion when it states that the Court rejected claims identical to NYSCA's. Motion to Dismiss or Affirm ("City's Motion") at 20-22. The City concedes that *Rotary* established that the right of intimate association is not limited to families but extends to other relationships which presuppose "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctly personal aspects of one's life." 55 U.S.L.W. at 4608, quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 (1984) ("*Roberts*"). The *Roberts* Court previously established that the determination of an association's right to constitutional protection requires a careful assessment of relevant factors such as "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Roberts*, 468 U.S. at 620. See J.S. at 11. Applying such an analysis, the *Rotary* Court held that a California statute requiring a large international community service organization to admit women did not violate the first amendment. The Court, however, specifically distinguished selective membership organizations from such international service associations and excluded them from its holding. See 55 U.S.L.W. at 4609 n.6.

The City contends that Local Law 63's three prongs are consistent with the Court's constitutional analysis in *Rotary* and *Roberts*. This argument is like fitting square pegs into round holes. While the Court has looked to numerous factors to determine whether a club is constitutionally pro-

tected, Local Law 63 precludes a club which meets its three prongs from demonstrating many of the very factors considered in the *Rotary* and *Roberts* cases to show entitlement to constitutional protection. Indeed, two of Local Law 63's three prongs were not even considered in *Rotary* or *Roberts*.

Moreover, notwithstanding the City's reference to *Roberts*, Local Law 63's reliance on 400 members in its first prong as talismanic of an unprotected association is completely arbitrary. J.S. at 14. In addition, the City chooses to ignore entirely NYSCA's argument that the Local Law fails to consider how a highly selective membership policy and its attendant screening procedure may relate to size. Indeed, the Local Law fails to permit consideration of selectivity altogether, despite that factor's prominence as the true hallmark of a private club.

The City also fails to explain why the second prong's requirement of regular meal service is "consonant with traditional concepts of public accommodations." City's Motion at 25. The Court has never mentioned meal service as a relevant criterion, let alone a dispositive one. In addition, the City ignores the fact that to share a meal with another is an activity in which people regularly engage with social intimates for nonbusiness as well as business purposes. J.S. at 15. To use this aspect of club life as one of the elements of a preclusive test aimed at determining a club's public nature is irrational as a practical matter and insignificant as a constitutional one.

There is also no support for the City's argument that the third prong of Local Law 63 is an "effective and practical measure of the 'public' nature of club life." City's Motion at 23. The Court has never considered the financial contribution made by nonmembers to be of dispositive constitutional significance, even when given the opportunity. J.S. at 16 quoting *Rotary*, 55 U.S.L.W. at 4607. Perhaps the most glaring deficiency in the City's analysis of the

third prong is the mistaken assumption that it is constitutionally insignificant that Local Law 63 does not require a substantial portion of a club's income to be derived from nonmember business sources. City's Motion at 24-25. Local Law 63, both on its face and as interpreted by the regulations, adopts the position that the incidence of accepting nonmember revenue, and not the amount, determines whether a club is private. Such a test is at odds with the Court's requirement that the participation of nonmembers must be substantial before the association forfeits its constitutional protection. J.S. at 16-17.

The City's statement that the "law assesses continuity of business practices traditionally associated with public places," City's Motion at 25, cannot ameliorate the Local Law's deficiency. Nowhere in the Court's recent decisions has it approved a "continuity" test as a litmus test of constitutional rights. Of course, even arguing that the third prong assesses continuity of business practice is facetious; the law as construed by the regulations requires only 52 payments in a year. The fact that the 52 payments represent a tiny percentage of a club's annual transactions and de minimus revenue shows that the third prong is an insufficient substitute for constitutionally significant factors set forth in *Rotary* and *Roberts*.⁴

⁴ Similarly unavailing is the City's argument that the third prong addresses *Roberts*' consideration of the participation of strangers in a club in assessing its right to freedom of association. City's Motion at 24. The de minimus requirements of the third prong cannot meaningfully speak to strangers' participation at all. Moreover, in *Roberts*, the Court observed that "nonmembers of both genders regularly participate in a substantial portion of the activities central to the decision of many members to associate with one another including many of the organization's various community programs, awards ceremonies, and recruitment meetings." *Roberts*, 468 U.S. at 621. The fact that a member's employer may reimburse him or her for a "business" meal is simply irrelevant to the *Roberts* analysis of the impact of strangers in an association.

While the City acknowledges that size and operating policies are relevant to a proper constitutional inquiry, City's Motion at 22, the City has not shown that the three prongs—alone or in concert—allow a club to prove just what its operating and membership policies are. This goes to the heart of the law's unconstitutionality.

B. The City Fails to Rebut NYSCA's Argument That Local Law 63 Violates the Right to Freedom of Expressive Association.

The City resorts to a facile and conclusory interpretation of the Court's decisions in *Rotary* and *Roberts* to reject NYSCA's claim that Local Law 63 violates its members' right to freedom of expressive association. The Court did not, as the City suggests, adopt the position that the mere admission of an excluded group could never alter the content of a club's expressive association. Rather, the Court stated that neither Rotary nor Jaycees would have their particular associational purposes of community service and business advancement of young men, respectively, compromised by the admission of women. In contrast, certain of NYSCA's members which fall within the tripartite test may well exist for purposes of espousing unpopular ethnic, racial or gender-related positions. J.S. at 19-22. Some have been organized along single gender lines as an expression of their belief that certain forms of social intimacy and discourse may only be achieved in single sex settings. To force the admission of persons who either espouse contrary views, or whose presence alone may be inimical to the views of the clubs, does compromise the members' right of expressive association because "there can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together." *Roberts*, 468 U.S. at 623.

In addition, Local Law 63 is unconstitutional because it infringes club members' speech rights. The City does not disagree that the only difference between a social dinner and a business dinner is the content of what is discussed during the meal. Indeed, Local Law 63's Legislative Declaration states that the inclusion of the second prong is because club members "discuss" business at meals. City's Motion at 10-11. Thus, Local Law 63 forces clubs to monitor the content of members' conversations to protect their constitutional rights and preserve their membership policies. The Local Law has a chilling effect on the exercise of members' speech rights in a social setting; in this sense, it is also unconstitutional because it is overbroad.

The City has not responded to the argument that Local Law 63 is unconstitutional because it adopts an irrebuttable presumption that an organization which meets the tripartite test is automatically deprived of the freedom of association. CONPOR Brief at 29-40. By having established a limited set of exclusive factors, the tripartite test is not precisely tailored; indeed, the test completely fails to distinguish between associations deserving protection and those that do not.⁵

II. LOCAL LAW 63'S EXEMPTION OF BENEVOLENT ORDERS AND RELIGIOUS CORPORATIONS VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION.

As demonstrated above, NYSCA's members have fundamental constitutional rights which are infringed by Local Law 63. Therefore, for its exemption of certain groups to withstand constitutional challenge, the City must demonstrate "that its classification has been precisely tailored

⁵ This is striking because even the City Council stated in its Legislative Declaration that business "often" occurs in clubs which fall within Local Law 63. City's Motion at 10. Yet given the irrebuttable nature of the Local Law, those selective clubs in which only insignificant business occurs have no right to demonstrate that fact before a trier of fact.

to serve a compelling governmental interest." *Plyler v. Doe*, 457 U.S. 202, 217 (1982). See also *Attorney General of New York v. Soto-Lopez*, — U.S. —, 106 S. Ct. 2317, 2322 (1986). The City cannot do so because the exemption serves no legitimate purpose and is without any legislative history to support it.

The City contends that Local Law 63 does not violate the equal protection clause even though exempted benevolent orders and religious corporations may fall within the tripartite test. Far from being necessary to the accomplishment of Local Law 63's stated objectives, its classification scheme is completely contrary to and subversive of the Local Law's avowed purpose of eradicating discrimination. This is because it permits the exempt class to engage in the proscribed conduct. In this connection, the City ignores NYSCA's argument that if the conduct targeted by the Local Law in fact does not occur in benevolent organizations and religious corporations, they should necessarily fail Local Law 63's tripartite test of their own accord.⁶ Under these circumstances, a specific exemption for benevolent orders and religious corporations does not further any legitimate legislative objective but, indeed, defeats it.

In actuality, the City's only proffered defense to the classification scheme is that "[s]pecial treatment for benevolent orders and religious corporations is unremarkable in New York State." City's Motion at 29. The City argues that both groups are the subject of distinct bodies of State legislation. *Id.* The City fails to explain what about these

⁶ Of course, if the exempt organizations meet the three-prong test in the absence of the targeted conduct, that fact in itself would demonstrate that Local Law 63 is not drawn narrowly enough to identify business-oriented associations. Moreover, a large business-oriented benevolent organization should not be granted greater constitutional protection than a relatively small selective club when both meet the three prongs.

separate legislative enactments, other than their existence, justifies the exemption. Nothing in the religious corporations or benevolent orders statutes prevents either of these two groups from accepting payment from nonmembers in furtherance of trade or business. Indeed, as the dissenting Appellate Division Justice noted and numerous cases show, these organizations often engage in business activities. J.S. 20a-22a, 28-29. The fact that both groups for definitional purposes may be identified in distinct bodies of legislation cannot justify the exemption.⁷

The City also cites two State laws which exclude benevolent orders in a further effort to justify the exemption. City's Motion at 29. Those statutory exemptions, however, either bear some relation to the purpose of the statute, N.Y. Civ. Rights Law § 53, or exempt benevolent orders as well as a number of other institutions, N.Y. Educ. Law § 5001(2)(e). Significantly, the State's anti-discrimination statute, N.Y. Exec. Law § 292 (McKinney 1982), does not exempt benevolent orders and religious corporations. Nor has the City identified any similar exemptions in statutes involving labor, health and general welfare, taxation, real property, not-for-profit corporations and the like. Thus, what the City fails to understand is that benevolent orders and religious corporations are generally governed by the same laws which govern private clubs and are not exempted from such laws when to do so is inconsistent

⁷ The City also contends that the fact that the exempt organizations are statutorily defined is proof they exist for the benefit of their members and are therefore not "public" within the meaning of Local Law 63. City's Motion at 28. The City does not explain, however, why the fact that NYSCA's members also exist for the benefit of their members does not create the same irrebuttable presumption that they are non-public, thereby entitling them to a similar exemption. And if mere incorporation pursuant to public law is sufficient, then certain of NYSCA's members should also qualify for such treatment. See, e.g., Chapter 594 of the Laws of New York (April 28, 1865) (incorporating the University Club).

with their legislative purpose. Such exemption is unjustified with respect to Local Law 63.*

Finally, notwithstanding its citation to Local Law 63's preamble, City's Motion at 30, the City does not contest the fact that the City Council heard *no* evidence to support the exemption and, to the extent there was testimony on the subject at all, such testimony was against it. See J.S. at 28 n.13. In this context, the City has conceded that the Court will strike down statutes where the legislative history is silent as to the reason for the classification. See *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266, 272-74 (1936). City's Motion at 31 n.14.

Accordingly, the City cannot demonstrate that Local Law 63's exemption is supported by a rational, let alone compelling, basis; it therefore denies NYSCA's members equal protection of the laws.

CONCLUSION

NYSCA's challenge to Local Law 63 presents substantial constitutional questions concerning the rights of members of private clubs with selective membership policies. Resolutions of these questions by the Court will have wide-ranging impact on jurisdictions throughout the country and will affect untold thousands of American citizens. Accordingly, NYSCA respectfully requests that the Court deny the City's motion, note probable jurisdiction and order full briefs and oral argument on the merits.

* The City's reliance on *Bryant v. Zimmerman*, 278 U.S. 63 (1928) in this context is inapposite. There, the exclusion of benevolent orders from the filing requirement of Section 53 of the Civil Rights Law was premised on the legislative determination that benevolent orders had for many years justified their existence and were not an actual danger to the State. 278 U.S. at 75-76. Their exemption, therefore, was related to the purpose of the statute. The exemption at issue herein bears no similar relationship.

Dated: August 11, 1987

Respectfully submitted,

ALAN MANSFIELD
Counsel of Record
ANGELO T. COMETA
LOUIS J. LEFKOWITZ
DEBRA A. ROTH
40 West 57th Street
New York, New York 10019
(212) 977-9700
Attorneys for Appellant

AMICUS CURIAE

BRIEF

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NEW YORK STATE CLUB ASSOCIATION, INC.,
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THE CITY OF NEW YORK, THE MAYOR OF
THE CITY OF NEW YORK, THE CITY HUMAN
RIGHTS COMMISSION and THE MEMBERS OF
THE CITY HUMAN RIGHTS COMMISSION,
Appellees.

**Appeal From the Court of Appeals of the
State of New York**

**BRIEF OF THE CONFERENCE OF PRIVATE
ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF
APPELLANT'S JURISDICTIONAL STATEMENT**

THOMAS P. ONDECK
Counsel of Record
BRADLEY L. JOSLOVE
BAKER & MCKENZIE
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 298-8290

*Attorneys for Amicus Curiae
The Conference Of Private
Organizations*

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The Conference of Private Organizations respectfully submits this brief as amicus curiae in support of the Jurisdictional Statement of the New York State Club Association, Inc. 1/

INTEREST OF AMICUS

The Conference of Private Organizations ("CONPOR") is a coalition of national, private membership organizations. 2/ CONPOR was formed in order to

1/ Written consent to the filing of this brief amicus curiae in the United States Supreme Court has been obtained from all parties to the case. Copies of the consent letters accompany this brief.

2/ The following organizations are members of CONPOR: the Benevolent and Protective Order of Elks, a benevolent, ritualistic, and fraternal society that charters approximately 2,250 lodges, which have approximately 1,650,000 members; the Loyal Order of Moose, a benevolent, ritualistic and fraternal society that charters approximately 2,250 lodges, which have approximately 1,300,000 members; the Great Council of U.S. Improved Order of Red Men, a benevolent, ritualistic, and fraternal society that charters approximately

defend and protect the fundamental rights of its members, and citizens generally, to associate freely and privately upon such terms and conditions as they shall solely determine. CONPOR promotes this right by participating in judicial cases, providing information to legislative and administrative officials, and conducting educational activities.

CONPOR's interest in this case arises from the diversity of membership requirements, limitations, and restrictions of the organizations which it represents.

940 local lodges, which have approximately 53,616 members; Kiwanis International, a social and service organization that charters approximately 8,200 local Kiwanis clubs with approximately 313,000 individual members; the National Club Association, whose membership consists of over 1,000 private social clubs which have about one million individual members; the National Association of American Business Clubs whose membership consists of 136 private clubs, which have over 6,600 individual members; the United States Power Squadrons, whose membership consists of 450 local groups, which have over 50,000 members.

Some of these organizations limit their membership primarily on the basis of broad, objective classifications such as gender, age, religious belief, or literacy. Others rely primarily on subjective membership qualifications such as congeniality, avocation, social status, or economic status. Most employ both types of restrictions to one degree or another. CONPOR believes that the constitutional right of association protects the right of its membership associations to be selective in their core membership functions -- voting, holding office, and making policy--on the basis of either broad, objective classifications such as gender, or on the basis of subjective factors such as congeniality, social status, or the like. ^{3/} Each of these membership

^{3/} CONPOR supports all of the arguments advanced in Appellant's Jurisdictional Statement. This

policies represents a choice that is within the discretion of the group's members and may not be subject to government control.

CONPOR's interest in the present case is not only a matter of principle; many of CONPOR's members will be directly affected by the outcome of this appeal. Many of CONPOR's constituent associations have members in New York. For example, 28 clubs that belong to the National Club Association are located in New York City. In fact, some of these clubs have already been subjected to administrative complaints by the New York City Commission on Human Rights pursuant to Local Law 63, the law being challenged in the present

brief amicus curiae, however, focuses on the issue most fundamental to CONPOR's membership--the constitutional right of private association.

action. ^{4/} Other private social clubs in New York await similar complaints if this Court does not strike down Local Law 63. Furthermore, although for reasons of political expediency Local Law 63 presently exempts benevolent organizations from its sweep, a different political climate may prompt New York City to eliminate this exemption. ^{5/} Consequently, the

^{4/} The United States District Court for the Southern District of New York recently held that as a result of the New York Court of Appeals decision in the case at bar, res judicata bars the University Club and the Union League Club from challenging the constitutionality of Local Law 63 on its face and as applied to them in an administrative complaint pending before the New York City Commission on Human Rights (except that the Plaintiffs may replead a selective enforcement argument). University Club v. City of New York, Nos. 86 Civ. 2330, 86 Civ. 2343 (S.D.N.Y. March 18, 1987), appeals filed, Nos. 87-7312, 87-7372 (2d Cir. April 15 and 16, 1987).

^{5/} It is noteworthy that the recently enacted Los Angeles Ordinance and the District of Columbia and Buffalo bills modeled after Local Law 63 do not exempt benevolent organizations from their purview. See Los Angeles, Cal.,

associational rights of members of benevolent organizations and private social clubs in New York City depend on the outcome of this case.

Being a national organization, CONPOR is also concerned about the impact of this case on its members throughout the country. Los Angeles recently enacted an ordinance, almost identical to Local Law 63, prohibiting discrimination by clubs or organizations which are not distinctly private. L.A. Ordinance, supra note. 5. Legislation modeled after Local Law 63 is under consideration in other cities across

Ordinance No. 162426 (approved May 28, 1987) (The ordinance will go into effect on or about June 28, 1987) [hereinafter L.A. Ordinance]; District of Columbia, Bill to amend Section 102(x) of the Human Rights Act of the District of Columbia (D.C. Law 2-38 D.C. Code § 1-250 2(24)) (1987) [hereinafter D.C. Bill]; Buffalo, N.Y., Proposed Ordinance Amendment - New Article XXIII Added to Chapter VII - Discriminatory Practices Concerning Membership or Facilities (1987) [hereinafter Buffalo Bill].

America. Bills expressly patterned after Local Law 63 have been introduced in Philadelphia, Washington D.C., and Buffalo. 6/ In Detroit, an ordinance modeled after Local Law 63 was adopted by the city council only to be vetoed by Mayor Coleman Young because, inter alia, he wished to avoid costly litigation pending the outcome of the present case. 7/ In Chicago, a committee currently is developing an ordinance patterned after Local Law 63. 8/ The success of these legislative attacks on the

6/ Philadelphia, Pa., Bill No. 835 amending Chapter 9-1100 of The Philadelphia Code, (introduced February 20, 1986) [hereinafter Philadelphia Bill]; D.C. Bill, supra note 5; Buffalo Bill, supra note 5.

7/ Coleman Young, Mayor of Detroit, Letter to the Detroit City Council, dated July 24, 1986, (notifying the Council of his veto of the private club ordinance #14-86 adopted by the Council on July 16, 1986).

8/ Chicago Tribune, May 6, 1987, § 2 at 6.

constitutional right of association of private organization members throughout the country turns on the outcome of the present litigation.

ARGUMENT

I. LOCAL LAW 63 VIOLATES THE CONSTITUTIONAL RIGHT OF PRIVATE ASSOCIATION BECAUSE IT CREATES AN IRREBUTTABLE PRESUMPTION THAT PRIVATE ORGANIZATIONS WHICH MEET ITS TRIPARTITE TEST ARE NOT DISTINCTLY PRIVATE, AND THUS PRECLUDES THE CAREFUL ASSESSMENT OF OBJECTIVE CHARACTERISTICS WHICH THE COURT IN ROBERTS AND ROTARY FOUND WAS NECESSARY TO DETERMINE THE LIMITS OF A STATE'S AUTHORITY OVER THE FREEDOM OF AN INDIVIDUAL TO ENTER INTO A PARTICULAR ASSOCIATION

The right of privacy, in essence "the right to be let alone," has been described as "[t]he most comprehensive of rights and the right most valued by civilized men," Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), overruled, Katz v. U.S., 389 U.S. 347 (1967), and as "the beginning of all freedom," Public Utilities Commission v.

Pollak, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting). The Supreme Court has expressly recognized that this individual right of privacy extends to groups as the right of association. In Bell v. Maryland, 378 U.S. 226 (1964), Justice Goldberg elaborated:

[i]t is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.

378 U.S. at 313 (concurring).

Pursuant to these constitutional principles, the Court in Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974), stated that the actions the State may take against groups with selective memberships are very limited, even if these groups discriminate on the basis of race. Specifically, the Court concluded that the

State may not exclude such a group from a public park merely because it has an "all-Negro, all-Oriental, or all-white" membership policy. 417 U.S. at 575. The Court cited with approval at 575 the dissenting opinion of Justice William O. Douglas, joined by Justice Thurgood Marshall, in Moose Lodge No. 107 v. Irvis 407 U.S. 163 (1972). In that case, Justice Douglas wrote:

My view of the First Amendment and the related guarantees of the Bill of Rights is that they create a zone of privacy which precludes government from interfering with private clubs or groups. The associational rights which our system honors permits all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires. So the fact that the Moose Lodge allows only Caucasians to join or come as guests is constitutionally irrelevant, as is the decision of the Black Muslims to admit

to their services only members of their race.

407 U.S. at 179-80 (footnote omitted).

In Roberts v. United States Jaycees, 468 U.S. 609 (1984), the Court explained that the freedom of private association is a fundamental element of individual liberty protected by the Constitution.

The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. . . . [C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State. Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability inde-

pendently to define one's identity that is central to any concept of liberty.

468 U.S. at 618-619 (citations omitted).

While reaffirming the constitutional basis of the freedom of private association recognized in earlier cases, the Court in Roberts held that only those relationships which among other things are "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship," warrant constitutional sanctuary from state interference. 468 U.S. at 620. The Court did not specifically list which relationships warrant this constitutional protection, preferring instead to outline the process by which the determination must be made. The Court stated, "determining the limits of state authority over an individual's freedom to

enter into a particular association . . . unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." Id. The objective characteristics which the Court found relevant include size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship. Id. at 620-621. ^{9/}

^{9/} The factors identified by the Court as relevant have been used in other cases in which the courts considered whether an association is private. In Cornelius v. Benevolent Protective Order of Elks, 382 F.Supp. 1182 (D. Conn. 1974), the district court identified eight factors which should be considered in determining whether a club is private, including, inter alia, selectivity in admissions, existence of formal membership procedures, degree of membership control over internal governance and the use of club facilities by nonmembers. After applying these eight factors, the court held that the Connecticut chapter of the Elks was a private club. See also Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 438-439 (1973) (an organization which has no plan or purpose of exclusiveness is not a private club); Sullivan v. Little Hunting Park, 396 U.S. 229,

In Roberts and the recently decided case, Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 55 U.S.L.W. 4606 (U.S. May 4, 1987), the Court conducted a

236 (1969) (same); Kiwanis Int'l v. Ridgewood Kiwanis Club, 806 F.2d 468, 473 (3d Cir. 1986), petition for cert. filed, 55 U.S.L.W. 2456 (U.S. Feb. 24, 1987) (key test for whether an association is a "place of public accommodation" is whether it issues open invitation to members of public at large, or is selective in its membership policies); Wright v. Salisbury Club, Ltd., 632 F.2d 309, 311-313 (4th Cir. 1980) (Salisbury Club held not to be a "truly private club" because it had no plan or purpose of exclusiveness, did not follow a selective membership policy, actively solicited members through public advertising, and served the commercial interests of the developer of the Salisbury subdivision); State of New York v. Ocean Club, 602 F.Supp. 489 (E.D.N.Y. 1984) (Ocean Club held to be a "place of public accommodation" because membership extended to large, infinite segment of public with no plan of exclusivity, many members have no control over club governance, members actively solicited from public at large and major club facilities used by general public); Wright v. Cork Club, 315 F.Supp. 1143 (S.D. Tex 1970) (Cork Club found to be a "place of public accommodation" because it did not carefully screen applicants for membership, did not limit use of facilities to members and bona fide guests, was not controlled by the membership, was not operated solely for benefit and pleasure of members, and directed publicity to more than just its members for their information and guidance).

"careful assessment" which focused on "objective characteristics" to determine whether the relationships among members of the United States Jaycees and the Rotary Club, respectively, were sufficiently private and exclusive so as to warrant constitutional protection. In both cases, the Court found that the relationships were not constitutionally protected. ^{10/} Consonant with the case-by-case assessment

^{10/} In Roberts, 468 U.S. at 621, the Court held that because the United States Jaycees are neither small nor selective and much of the activity central to the formation and maintenance of the association involves the participation of strangers to that relationship, the relationships among members are not the type of intimate and personal relations meant to be protected by the Constitution from state interference. Similarly, in Rotary, 55 U.S.L.W. at 4608-4609, the Court held that the relationships among Rotary Club members do not warrant constitutional protection in light of the large size of local clubs, the high turnover rate among club members, the inclusive nature of each club's membership, the public purposes behind the clubs' service activities, and the fact that the clubs encourage the participation of strangers in and welcome media coverage of, many of their central activities.

of objective factors mandated by the holdings in Roberts and Rotary, the Court in Rotary expressly left open the question of the extent to which the Constitution protects from state intrusion the private associational rights of members of selective private clubs.

Similarly, we have no occasion in this case to consider the extent to which the First Amendment protects the right of individuals to associate in the many clubs and other entities with selective membership that are found throughout the country. Whether the "zone of privacy" established by the First Amendment extends to a particular club or entity requires a careful inquiry into the objective characteristics of the particular relationships at issue. Roberts v. United States Jaycees *supra*, at 620. Cf. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179-180 (1972) (Douglas J., dissenting.)

55 U.S.L.W. at 4609 n.6.

The present case provides the Court with the opportunity, in fact, the pressing need, to answer this question left

open in Rotary. New York City has provided its answer: the associational rights of members of private social clubs with over 400 members are not entitled to constitutional protection. New York City has effectively legislated this answer by enacting Local Law 63 which creates an irrebuttable presumption that a private social club which meets the law's tripartite test is not "distinctly private". 11/ If a club is found to be

11/ New York City Local Law 63 amended New York City's public accommodations law, Administrative Code of the City of New York, Title 8 §§ 8-101 *et seq.*, and provides in pertinent part that:

The term "place of public accommodation, resort of amusement" shall include . . . all places included in the meaning of such terms as: inns, travens, road houses, hotels, motels Such term shall not include . . . any institution, club or place of accommodation which proves that it is in its nature distinctly private. An institution club or place of accommodation shall not be considered in its nature

not distinctly private, the members lose all protection from state or city interference with their constitutional right of private association; New York City is then free to impose a broad range of regulations on the club which go to the very core of the club's membership policies, purposes, and practices.

distinctly private if it has more than four hundred members, provides regular meal service and regularly receives payments for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business. For the purpose of this section a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or the religious corporations law shall be deemed to be in its nature distinctly private.

Administrative Code of the City of New York,
Title 8 § 8-102(9) (Local Law 63 is
underscored).

Local Law 63 only permits the consideration of three factors -- whether a club has more than 400 members, regularly provides meal service, and regularly receives payments from members or nonmembers in furtherance of trade or business; the consideration of all other factors is prohibited. Thus, regardless of whether a club could demonstrate that it possesses the objective characteristics found constitutionally significant by this Court, ^{12/} Local Law 63 would strip the members of all constitutional protection if the club meets the tripartite test. Local Law 63 violates the Constitution

^{12/} In Roberts, 468 U.S. at 620-621, and in Rotary, 55 U.S.L.W. at 4608-4609, the Court considered, inter alia, the following objective criteria: selectivity in membership determinations, whether the club recruits or advertises for members, whether it has a plan of exclusiveness, and whether it specifically excludes nonmembers from participation in the club's central functions. Local Law 63 precludes the consideration of any of these criteria.

because it forecloses the careful assessment of objective characteristics that this Court found unavoidable in determining the limits of state authority over an individual's freedom to enter into a particular association.

Moreover, a review of Local Law 63 demonstrates its fundamental inadequacy as a test of whether the relationships between members of a particular club are among the class of relationships meant to be protected from state interference by the constitutional right of private association. The first prong of the tripartite test requires that the club have more than 400 members. While the size of a club's membership has been considered in previous cases, there is no precedent to support the arbitrary choice of a specific number of members beyond which a private organization will not be considered worthy

of constitutional protection. ^{13/} Size, like all factors considered by the Court, is relative. The size of a club can not be considered apart from the club's purposes, membership policies, and practices. Many clubs with more than 400 members have maintained an atmosphere of social intimacy as a result of membership policies which only allow admission of

^{13/} The arbitrariness of the 400 member limit is highlighted by a comparison of that criterion with the size criterion in some of the proposed ordinances under consideration in other cities. The District of Columbia bill sets the limit at 350 members, while the Philadelphia bill sets the limit at 200 members. See D.C. Bill, supra note 5, Philadelphia Bill, supra note 6. If these bills become law, a club's geographical location will determine the scope of constitutional protection afforded the associational rights of the club's members. Members of a 300 member club which meets the final two prongs of the test would not be entitled to any protection of their right of private association if the club were located in Philadelphia, while members of identical clubs in New York and the District of Columbia would be afforded constitutional protection. This absurd situation is the natural result of a law which conditions constitutional protection on an arbitrarily selected membership limit.

prospective members who have been nominated by a club member and seconded by other members, thus creating an interlocking network of personal relationships. Under the New York City law, these policies are not even considered.

The second criterion, whether a club "provides regular meal service", would tend to support, not detract from, the private nature of a club. To "break bread" with another is an intimate experience which one does not share with the general public. For example, a waiter would not seat strangers at the same table without their permission. Indeed, a law which attempted to dictate the identity of an individual's eating companions surely would be struck down as a violation of the constitutional right of privacy. Much of the fraternalism and comradery of a club comes from the opportunity it provides its members who have engaged in a game of

tennis, golf, or other club activity, to relax and converse with his or her friends over a meal. To use this aspect of private club life as one of the elements which makes a club a place of public accommodation is a reversal of logic. ^{14/}

The final criterion, whether a club "regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business", suffers from several serious flaws. This requirement, as defined by the regulations of the New York City Commission on Human Rights, is fulfilled if a club receives one payment per week from its own members for

^{14/} The inappropriateness of using the provision of meals as a criterion is underscored by the fact that neither in Roberts nor in Rotary did the Court ever mention meal service as relevant to a determination of whether the relationships between members of a particular club are sufficiently personal and exclusive to warrant constitutional protection.

nonmember guests, provided that those payments are in furtherance of trade or business. 15/ The law does not require that

15/ Regulation §1c provides:

"payment on behalf of a nonmember" shall mean payment by a member or nonmember for expenses incurred for dues, fees, use of space, facilities, services, meals or beverages by or for a nonmember.

New York City Commission on Human Rights, Regulations: Unlawful Discriminatory Practices in Institutions, Clubs, or Places of Accommodation Which Are Not Distinctly Private, ¶ 1 et seq. (Eff. date August 1, 1985) (emphasis supplied).

Regulation § 1g provides:

"Regularly receives payment". An institution, club or place of accommodation "regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for as many such payments during the course of a year as the number of weeks any part of which the institution, club or place of accommodation is available for use by members or nonmembers per year.

the payments be substantial; payment of a few dollars for drinks is sufficient under the regulations. Thus, a club open for use throughout the year would lose its private club exemption merely because on 52 occasions its members bought drinks for business associates. Clearly, the third criterion is inadequate because it does not distinguish between clubs which receive a substantial amount of payments in furtherance of trade or business and those which only receive an insignificant amount.

Furthermore, this criterion does not allow for consideration of whether the furtherance of business or trade is an important purpose of the club or its members or whether it is simply an incidental benefit. Local Law 63 would ignore the fact that a particular club's bylaws specifically discourage use of the club for purposes of business, or the fact that

the vast majority of a club's members do not use the club in order to advance their own or nonmembers' business or trade. A significant distinction exists between a club which has as its central function the provision of services to the public for which the club is reimbursed, and a club dedicated to the pursuit of its members' personal, non-occupational interests which incidentally receives an insubstantial number of payments by members in furtherance of those members' business or trade. The former would be more akin to a commercial establishment, while the latter is likely to be considered a private social club under the criteria used in previous cases before this Court. Nevertheless, under Local Law 63 both clubs would be treated identically; they would

both be found "not distinctly private." 16/

16/ Instructive here is the following observation of the court in Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis Int'l:

The fact that individual members may use their membership in a club to further their own business interests does not, in any way, change the avowed purposes of the organization, or convert it into a commercial club.

There can be no doubt that membership in a golf club, for example, may be used by some members to promote business connections and that certain employers of such members might even pay their dues. It is also conceivable that there are some who join a charitable or religious organization and become active therein, because of possible selfish or commercial benefits. Should the activities or motives of some individual members be sufficient to convert such organization itself into a commercial enterprise?

83 Misc. 2d 1075, 1078 (Sup. Ct. 1975), aff'd, 52 A.D.2d 906 (2d Dep't 1976), aff'd 41 N.Y.2d 1034, cert. denied, 434 U.S. 859 (1977). See also, Kiwanis Int'l v. Ridgewood Kiwanis Club, 806 F.2d at 478 (Adams, J. concurring) (fact that employers often pay dues of employee members not dispositive in determining whether

The facial unconstitutionality of Local Law 63 is seen not only in the flawed nature of the three characteristics which it does consider, but more fundamentally it is seen in the law's preclusion of any consideration of other relevant characteristics. The law does not allow consideration of the club's selectivity in admission of members, whether the club recruits or advertises for members, whether it has a plan of exclusiveness, whether it specifically excludes nonmembers from participation in the club's central functions, and other objective characteristics which this Court analyzed in previous cases in order to determine whether membership in a particular club merits constitutional protection. 17/

association is "distinctly private.")

17/ See Rotary, 17 U.S.L.W. at 4608-4609, and Roberts, 468 U.S. at 620-621.

In sum, Local Law 3 must be struck down because it specifically precludes the "careful consideration" of "objective characteristics" which this Court has stated is necessary in order to determine the limits of state authority over an individual's freedom to enter into a particular association.

II. LOCAL LAW 63 VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FEDERAL CONSTITUTION BECAUSE IT DENIES TO MEMBERS OF CERTAIN PRIVATE ORGANIZATIONS THE PROTECTION OF THE CONSTITUTIONAL RIGHT OF PRIVATE ASSOCIATION ON THE BASIS OF AN INACCURATE, IRREBUTTABLE PRESUMPTION WHICH IS NOT NECESSARY FOR THE ATTAINMENT OF A COMPELLING GOVERNMENTAL INTEREST

As discussed in Argument I, Local Law 63 conclusively presumes that an organization which meets the law's tripartite test does not involve the type of personal relationships meant to be protected from governmental interference by the freedom of private association. Because Local Law 63 sets forth the criteria to determine

which organizations will be denied the freedom of private association, "a fundamental element of liberty protected by the Bill of Rights", ^{18/} it must withstand strict judicial scrutiny under the equal protection clause of the fourteenth amendment. See, e.g., Plyler v. Doe, 457 U.S. 202, 217 n.15 (1982) ("In determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein.")

Accordingly, New York City must demonstrate that the classification established by Local Law 63 is necessary to effectuate a compelling governmental interest. See, e.g., id. at 216-217 ("With respect to such classifications [those that disad-

^{18/} Rotary, 55 U.S.L.W. at 4608.

vantage a suspect class or that impinge upon the exercise of a fundamental right], it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest."); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) ("any classification which serves to penalize the exercise of that right [a constitutional right], unless shown to be necessary to promote a compelling governmental interest is unconstitutional.")

Two cases in which this Court struck down statutory irrebuttable presumptions which impinged on the exercise of fundamental rights are illustrative of the application of equal protection principles to the present case. First, in Carrington v. Rash, 380 U.S. 89 (1965), the Court struck down a provision of the Texas Constitution which prohibited servicemen

living in Texas who were not residents of Texas at the time of their induction from voting in any state election during the period of service. Having found that some servicemen were bona fide residents, that "more precise tests," id. at 95, were available to distinguish members of this latter group, and that the right to vote is "close to the core of our constitutional system", id. at 96, the Court held that "[b]y forbidding a soldier ever to controvert the presumption of nonresidence, the Texas Constitution imposes an invidious discrimination in violation of the fourteenth amendment." Id.

Similarly, in Stanley v. Illinois, 405 U.S. 645 (1972), the Court struck down as violative of the equal protection and due process clauses of the Federal Constitution Illinois' irrebuttable statutory presumption that all unmarried

fathers are unqualified to raise their children. Because of that presumption, the statute allowed the State, upon the death of the mother, to take custody of all such illegitimate children, without providing any hearing on the father's parental fitness. The Court first recognized the fundamental nature of an unmarried man's interest in the custody of his own children. "The rights to conceive and to raise one's children have been deemed 'essential', 'basic civil rights of man,' and '[r]ights far more precious . . . than property rights,'" Id. at 651 (citations omitted). The Court then stated that it may be "that most unmarried fathers are unsuitable and neglectful parents. . . . But all unmarried fathers are not in this category; some are wholly suited to have custody of their children." Id. at 654. Hence, the Court held that the State could not conclusively presume that any

individual unmarried father was unfit to raise his children; rather, the state was required by the due process clause to provide a hearing on that issue. ^{19/} Furthermore, because the statute denied to unmarried fathers a hearing which it extended to all other parents whose custody of children was challenged, the Court held that the State denied the unmarried fathers the equal protection of the the

^{19/} Similar to the law struck down under the due process clause in Stanley, Local Law 63 creates an irrebuttable presumption which impinges on the exercise of fundamental rights, is not necessarily or universally true, and is not the only reasonable means of effectuating the legislative goal; hence, Local Law 63 violates the due process clause of the fourteenth amendment. See Stanley 405 U.S. at 654. See also Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (Regulations employing irrebuttable presumptions which impinge on the fundamental right to bear children, are not necessarily true, and are not the only means by which to meet the legislative goal, were struck down as in violation of the due process clause of the fourteenth amendment).

laws guaranteed by the fourteenth amendment. Id. at 649. ^{20/}

The principles in Rash and Stanley apply to the present case. Local Law 63 carves out of the general class of private clubs, a subclass -- those that meet the tripartite test -- which is irrebuttably presumed to be "not distinctly private", and thus, not worthy of the protection of the right of private association. Other clubs are not subject to such an irrebuttable presumption; they are allowed to present and the New York Human Rights Commission is allowed to consider all facts relevant to whether the club is distinctly private. This discrimination against members of clubs which meet the tripartite test of Local Law 63 should be struck down as a violation of the equal

^{20/} Mr. Justice Douglas did not join in the Court's holding with respect to the equal protection clause.

protection clause of the fourteenth amendment because the classification is not necessary to effectuate the City's objective to eliminate invidious discrimination in places of public accommodation.

As discussed in Argument I, the classification enacted by Local Law 63 not only fails to distinguish adequately those clubs involving relationships which merit constitutional protection from those which do not merit such protection, the law actually precludes the New York Human Rights Commission from considering the objective characteristics necessary to make this distinction. Clearly, Local Law 63 is far from "precisely tailored to serve a compelling governmental interest". 21/

Moreover, the irrebuttable presumption in Local Law 63 is not neces-

21/ Plyler v. Doe, 457 U.S. at 216-217 (emphasis supplied).

sary to the achievement of the law's purpose. For example, the City could conduct a hearing consonant with the method of determination in Roberts and Rotary in which all the relevant objective characteristics are carefully considered. 22/ This alternate procedure would not only achieve the law's purpose of preventing discrimination in associations which are not distinctly private, it would do so without violating

22/ It is unlikely that such a determination would entail significant additional costs to the City because the New York City Human Rights Law already provides for an individualized hearing at which evidence is presented.

the associational rights of private social clubs. 23/

23/ New York City could also follow the procedure of the Equal Employment Opportunity Commission in determining whether an organization qualifies as a bona fide private membership club exempt from Title VII coverage pursuant to the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000a(e) (1982). The Commission makes a case-by-case determination considering all relevant considerations which bear on whether an organization is (1) a club in the ordinary sense of the word, (2) is private, and (3) requires meaningful conditions of limited membership. The Commission set forth as factors it would consider, inter alia, the following:

(1) the extent to which it [the organization] limits its facilities and services to club members and their guests;

(2) the extent to which and/or the manner in which it is controlled or owned by its membership;

(3) whether and, if so, to what extent and in what manner it publicly advertises to solicit members or to promote the use of its facilities or services by the general public;

(4) the size and the existence of limitations on the size of the organization;

(5) the membership eligibility requirements.

The City's interest in irrebuttably presuming that a club is not distinctly private on the basis of only the three factors in Local Law 63 rather than undertaking a careful consideration of all the relevant objective criteria is at most a matter of administrative convenience. But, as the Court pointed out in Stanley, administrative convenience is an insufficient state interest to justify an irrebuttable presumption where other reasonable methods of determination exist.

[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less,

Equal Employment Opportunity Commission,
Policy Statement: Bona Fide Private Club Exemptions (Signed July 22, 1986), EEOC Notice Number N-915 (July, 1986).

and perhaps more, than mediocre ones.

405 U.S. at 658. In particular, when the City is deciding an issue of constitutional significance, i.e., whether membership in a particular club involves the class of intimate relationships meant to be protected from state interference by the Constitution, the interest of the State in administrative convenience is dwarfed by the fundamental right of club members to a fair opportunity to present and have considered relevant evidence relating to this constitutional determination.

In sum, Local Law 63 violates the equal protection and due process clauses of the Federal Constitution because it enacts an inaccurate, irrebuttable presumption which impinges on the right of private association, and which is not necessary to effectuate the legislative purpose.

CONCLUSION

In Roberts this Court identified the freedom of private association as "an intrinsic element of personal liberty." 468 U.S. at 620. The New York City law under challenge in the present case abridges this freedom by means of an irrebuttable presumption which precludes the careful consideration of objective characteristics which the Court in Roberts and Rotary found necessary in order to determine the limits of a state's authority over the freedom of an individual to enter into a particular association. The law also violates the equal protection and due process clauses of the Federal Constitution because it denies to members of private organizations which meet the law's tripartite test the protection of the constitutional right of private association on the basis of an inaccurate, irrebuttable presumption which is not

necessary for the attainment of a compelling governmental interest.

This case is significant not only because it involves the violation of appellants' constitutional rights, but more importantly, because the outcome in this case will determine the scope of constitutional protection to be granted the millions of private association members throughout the nation. Large cities across the nation are enacting or considering enactment of laws patterned after Local Law 63. The resolution of this appeal will preclude the need for the Court to address again these issues in future appeals. This case presents the Court with the opportunity to provide to the courts and legislatures of this country needed guidance regarding the scope of protection granted to members of private social clubs by the constitutional right of private association and regarding

the process which the Constitution demands be followed in determining a state's authority to interfere in the freedom of an individual to enter into an association.

For the foregoing reasons, the Court should note probable jurisdiction in this case and order briefs on the merits and oral argument.

Respectfully submitted,

THOMAS P. ONDECK
Counsel of Record
BRADLEY L. JOSLOVE
BAKER & MCKENZIE
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 298-8290

Attorneys for Amicus Curiae
The Conference of Private
Organizations

JOINT APPENDIX

(5)
No. 86-1836

Supreme Court, U.S.
FILED
NOV 19 1987

JOSEPH E. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

NEW YORK STATE CLUB ASSOCIATION, INC.,
Appellant,
vs.

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF
NEW YORK, THE CITY HUMAN RIGHTS COMMISSION and
THE MEMBERS OF THE CITY HUMAN RIGHTS COMMISSION,
Appellees.

On Appeal from the Court Of Appeals
Of the State of New York

JOINT APPENDIX

ALAN MANSFIELD
Counsel of Record
ANGELO T. COMETA
LOUIS J. LEFKOWITZ
DEBRA A. ROTH
PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
40 West 57th Street
New York, New York 10019
(212) 977-9700
Attorneys for Appellant

PETER L. ZIMROTH
Counsel of Record
Corporate Counsel for
the City of New York
100 Church Street
New York, New York 10007
(212) 556-4338
Attorney for Appellees

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

No. 86-1836

NEW YORK STATE CLUB ASSOCIATION, INC.,
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vs.

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF
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On Appeal from the Court Of Appeals
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The following Opinions and Orders have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to the printed Jurisdictional Statement:

Opinion of the Supreme Court of the State of New York, New York County, Special Term, Part I by Grossman, J., dated Oc- tober 28, 1985	JS 25a-40a
Order and Judgment of the Supreme Court of the State of New York, New York County, Special Term, Part I, dated No- vember 19, 1985	JS 23a-24a

Order of the Supreme Court of the State of New York, Appellate Division, First Department, Opinion of Fein, J. and dis- senting Opinion of Kupferman, J., dated July 31, 1986	JS 14a-22a
Order of the Court of Appeals of the State of New York and Opinion by Wachtler, C.J., dated February 17, 1987	JS 1a-13a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 24, 1984	Summons and Verified Complaint served
October 25, 1984	Plaintiff's Notice of Motion for Preliminary Injunction, Supporting Affidavit and Memorandum of Law served
November 7, 1984	Defendants' Affidavits in Opposition to Motion for Preliminary Injunction served
November 20, 1984	Verified Answer served
November 30, 1984	Order and Opinion in Supreme Court, Special Term, denying Motion for Preliminary Injunction signed
December 4, 1984	Defendants' First Set of Interrogatories served
December 18, 1984	Plaintiff's Notice of Appeal to Appellate Division, First Department from November 30, 1984 Order served
March 7, 1985	Order of Appellate Division, First Department affirming November 30, 1984 Order signed
April 12, 1985	Plaintiff's Answers to First Set of Interrogatories served
April 17, 1985	Plaintiff's Notice of Motion for Summary Judgment, Supporting Affidavit and Memorandum of Law served
May 24, 1985	Defendants' Notice of Cross-Motion for Summary Judgment, Supporting Affirmation and Memorandum of Law served

June 21, 1985	Plaintiff's Reply Brief on Motion and Cross-Motion for Summary Judgment served
July 2, 1985	Defendants' Reply Brief and Supplemental Affirmation on Motion and Cross-Motion for Summary Judgment served
October 28, 1985	Opinion denying Motion for Summary Judgment and granting Cross-Motion for Summary Judgment signed
November 19, 1985	Order and Judgment denying Motion for Summary Judgment, granting Cross-Motion for Summary Judgment and declaring Local Law 513-A to be constitutional signed
November 22, 1985	Plaintiff's Notice of Appeal to Court of Appeals from November 19, 1985 Order and Judgment served
December 6, 1985	Plaintiff's Notice of Motion for Relief Pending Appeal in Court of Appeals with Supporting Affidavit Served
December 12, 1985	Defendants' Affirmation in Opposition to December 6, 1985 Motion for Relief Pending Appeal served
December 19, 1985	Order of Court of Appeals denying December 6, 1985 Motion for Stay signed

February 11, 1986 Order of Court of Appeals transferring appeal to Appellate Division, First Department signed

February 21, 1986 Plaintiff's Notice of Motion in Appellate Division, First Department for Interim Stay with Temporary Restraining Order Pending Appeal, Supporting Affidavit and Memorandum of Law served

February 26, 1986 Defendants' Affirmation in Opposition to February 21, 1986 Motion served

February 28, 1986 Plaintiff's Reply Affirmation in Support of February 21, 1986 motion served

March 18, 1986 Order of Appellate Division, First Department denying February 21, 1986 Motion for Interim Stay signed

July 31, 1986 Order and Opinion of Appellate Division, First Department affirming November 19, 1985 Order and Judgment signed

August 11, 1986 Plaintiff's Notice of Appeal to Court of Appeals from July 31, 1986 order served

February 17, 1987 Order and Opinion of Court of Appeals of New York State affirming July 31, 1986 Order signed

May 11, 1987 Plaintiff's Notice of Appeal to United States Supreme Court filed

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

x Index No. 25028/84

NEW YORK STATE CLUB ASSOCIATION, : Plaintiff designates New
INC., : York County as the place of
: trial.

Plaintiff,

-against-

THE CITY OF NEW YORK, THE MAYOR :
OF THE CITY OF NEW YORK, THE : Plaintiff's place of business
CITY HUMAN RIGHTS COMMISSION and : is 31 East Main Street
THE MEMBERS OF THE CITY HUMAN : Rochester, N.Y.
RIGHTS COMMISSION, : County of Genesee

Defendants.

x

To the above named Defendants:

YOU ARE HEREBY SUMMONED to answer the verified complaint in this action and to serve a copy of your answer, or, if the verified complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorneys within twenty (20) days after the service of this summons, exclusive of the day of service (or within 30 days after service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded herein.

Dated: October 24, 1984

Defendants' address: City Hall
New York, New York

PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
Attorneys for Plaintiff
40 West 57th Street
New York, NY 10019
(212) 977-9700

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

<hr/>		X
NEW YORK STATE CLUB ASSOCIATION, :	:	
INC., :	:	
	:	
<i>Plaintiff,</i> :	:	
	:	
<i>-against-</i> :	:	VERIFIED COMPLAINT
	:	
THE CITY OF NEW YORK, THE MAYOR :	:	
OF THE CITY OF NEW YORK, THE :	:	
CITY HUMAN RIGHTS COMMISSION and :	:	
THE MEMBERS OF THE CITY HUMAN :	:	
RIGHTS COMMISSION, :	:	
	:	
<i>Defendants.</i> :	:	
<hr/>		X

Plaintiff, New York State Club Association, Inc., by its attorneys, Phillips, Nizer, Benjamin, Krim & Ballon, alleges:

1. Plaintiff is a corporation duly organized and existing under the laws of the State of New York and maintains its principal place of business in Rochester, New York.
2. Defendant, City of New York, is a duly organized and existing city and domestic municipal organization.
3. Defendant, Mayor of the City of New York, is the duly elected chief executive officer of the City of New York.
4. Defendant, City Human Rights Commission, is a New York City agency which, *inter alia*, is responsible for the enforcement of various anti-discrimination laws enacted by the City Council of the City of New York and codified in the Administrative Code of the City of New York which concern "Place[s] of Public accommodation."

5. Defendants, members of the City Human Rights Commission, are appointed by the Mayor of the City of New York and are charged with the responsibilities of carrying out the functions of the City Human Rights Commission.

6. Plaintiff is an organization, the membership of which comprises numerous private clubs in the State of New York, many of which are found in the City of New York (hereinafter "private City clubs"). Plaintiff's function is, *inter alia*, to represent and promote the interests and constitutional rights of all private clubs and institutions in the State of New York.

7. By virtue of federal law, 42 U.S.C. § 2000a(e), N.Y. Executive Law §§ 290 *et seq.* (McKinney's 1982) and § Bl-1.0 *et seq.* of the Administrative Code of the City of New York, "place[s] of public accommodation" are subject, *inter alia*, to various anti-discrimination laws. Prior to the enactment of Local Law 513-A, all federal, New York State and City of New York definitions of "place[s] of public accommodation" have explicitly recognized the fact that the private City clubs, in addition to numerous additional private clubs and associations, by virtue of their distinctly private nature, are not places of public accommodation. Accordingly, the members of these clubs and associations have heretofore enjoyed the full panoply of their constitutional rights including their rights of freedom of association and privacy.

8. On October 24, 1984, defendant, the City of New York, enacted Local Law 513-A which amends Title B of the Administrative Code of the City of New York and, *inter alia*, amends the definition of "place of public accommodation." A copy of Local Law 513-A is annexed as Exhibit A. Pursuant to the amendment, private clubs such as plaintiff and its members for the first time will be deemed to be "place[s] of public accommodation" unless such private clubs affirmatively prove that they do not (a) have in excess of 400 members, (b) provide regular meal

services and (c) regularly receive payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business. Clubs incorporated under or described in the benevolent orders law or religious corporations incorporated under the religious corporations or education law are exempt from Local Law 513-A.

9. There is a substantial likelihood that some of the private City clubs, which heretofore have been and continue to be excluded from federal and State definitions of "place of public accommodation," will fail to meet the affirmative burden of proof required by Local Law 513-A, and will thereby become subject to City of New York anti-discrimination laws, thus adversely affecting their policies, operations, conduct and purpose.

10. A violation of Local Law 513-A by any "place of public accommodation" can subject it to cease and desist orders, fines, penalties, imprisonment and other civil remedies.

11. The enactment of Local Law 513-A is illegal and violates plaintiff's and its members' constitutional rights of privacy, freedom of association, freedom of speech, equal protection and due process of law under the 1st, 4th, 9th and 14th amendments to the United States Constitution and art. I, §§ 6, 8, 9 & 11 of the Constitution of the State of New York. The enactment of Local Law 513-A also constitutes an unlawful bill of attainder in contravention of art. I, § 10 of the United States Constitution.

12. The enactment of Local Law 513-A will also cause direct and economic harm to plaintiff and its members as a result of loss of membership, loss of dues and expenditures necessary to comply with its terms. In addition, the mere existence and enforcement of Local Law 513-A threatens irretrievably to compromise the good will and reputation of the private City clubs, which have been

earned over the course of generations. In addition, Local Law 513-A will chill all the above-mentioned constitutional rights of private City clubs which may now be able to meet their affirmative burden under its provisions but which may choose to alter their policies, operations, conduct or purpose in the future in a manner which could cause them to fail to meet their affirmative burden under the amendment's provisions.

13. The enactment of Local Law 513-A is also illegal under art. 9, § 2 of the Constitution of the State of New York and § 10(c) of the Municipal Home Rule Law because it is preempted by, or is otherwise inconsistent with, statutory law of the State of New York, to wit, N.Y. Executive Law §§ 290 *et seq.*

14. The enactment of Local Law 513-A is also illegal in that it was not a proper or valid exercise of the police power of the City of New York and is unreasonable, arbitrary and capricious.

15. Local Law 513-A provides that it will be effective thirty days after its enactment. The existence and enforcement of Local Law 513-A will cause substantial and irreparable harm to plaintiff and its members in that it will cause severe economic hardship and violate their fundamental constitutional rights and privileges as set forth above.

16. On information and belief, as of the effective date of Local Law 513-A, defendant, City Human Rights Commission, will commence investigation and enforcement proceedings under Local Law 513-A against plaintiff and its membership.

17. Plaintiff and its members have no adequate remedy at law.

WHEREFORE, plaintiff asks for the following relief:

Judgment, pursuant to CPLR 3001 declaring that

(a) Local Law 513-A is unconstitutional and void, both on its face and as applied to plaintiff and its members;

(b) Local Law 513-A is unconstitutional and void in that it is inconsistent with the law of the State of New York;

(c) Local Law 513-A is unconstitutional and void because it constitutes an unlawful bill of attainder;

(d) defendants are preliminarily and permanently enjoined from enforcing Local Law 513-A; and

(e) plaintiff is entitled to costs, disbursements, attorneys' fees and such other and further relief as to the Court may seem just and equitable.

Dated: New York, New York
October 24, 1984

PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
Attorneys for Plaintiff
40 West 57th Street
New York, New York 10019
(212) 977-9700

THE COUNCIL

The City of New York

Local Law 63[*]

Introduced by the President (Ms. Bellamy)(by request of the Mayor) and Council Members Horwitz, Manton, Albanese, Alter, Berman, Dear, Dryfoos, Eisland, Ferrer, Foster, Friedlander, Gerges, Greitzer, Katzman, Maloney, Messinger, Michels, Pinkett, Sadowsky, Samuel, Spigner, Williams and Wooten.

A LOCAL LAW

- To amend the administrative code of the city of New York, in relation to the powers of the New York City Commission on Human Rights to eliminate discrimination in clubs that are not distinctly private.[**]

Be it enacted by the Council as follows:

Section one. Legislative Declaration. It is hereby found and declared that the city of New York has a compelling interest in providing its citizens an environment where all persons, regardless of race, creed, color, national origin or sex, have a fair and equal opportunity to participate in the business and professional life of the city, and may be unfettered in availing themselves of employment oppor-

[* The local law reproduced in the exhibits to the pleadings and motions in this action was labelled "Local Law" 513-A based on its designation in bill form as "Introductory Number 513-A." After enactment, it was designated Local Law 63 of 1984 and printed in final form. Consequently, Local Law 63 has been printed in this Joint Appendix in substitution for "Local Law" 513-A.]

[**] That portion of the City Human Rights Law amended by the local law is italicized.

tunities. Although city, state and federal laws have been enacted to eliminate discrimination in employment, women and minority group members have not attained equal opportunity in business and the professions. One barrier to the advancement of women and minorities in the business and professional life of the city is the discriminatory practices of certain membership organizations where business deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed. While such organizations may avowedly be organized for social, cultural, civic or educational purposes, and while many perform valuable services to the community, the commercial nature of some of the activities occurring therein and the prejudicial impact of these activities on business, professional and employment opportunities of minorities and women cannot be ignored.

The Council recognizes the interest in private association asserted by club members. However, the Council finds that this interest does not overcome the public interest in equal opportunity. Because small clubs, benevolent orders and religious corporations have not been identified in testimony before the Council as places where business activity is prevalent, the Council has determined not to apply the requirements of this local law to such organizations. However, the Council finds that business activity often occurs at clubs having more than four hundred members which provide regular meal service allowing persons to discuss business. The dues and expenses of members at such organizations are often paid by their employers, because the employee's activities at the organization help to develop the employer's business. The organizations also rent their facilities through members for use as conference rooms for business meetings attended by non-members. Organizations where such practices occur provide benefits to business entities and persons other than members and thus are not in fact "distinctly private" in their nature. For this reason, the Council has determined to apply the human rights law

to organizations which have more than four hundred members, provide regular meal service and regularly receive payment for dues, fees, use of space, facilities, services, meals or beverages from or on behalf of non-members for the furtherance of trade or business.

It is not the Council's purpose to dictate the manner in which certain private clubs conduct their activities or select their members, except insofar as is necessary to ensure that clubs do not automatically exclude persons from consideration for membership or enjoyment of club accommodations and facilities and the advantages and privileges of membership, on account of invidious discrimination. Nor is it the Council's purpose to interfere in club activities or subject club operations to scrutiny beyond what is necessary in good faith to enforce the human rights law.

2. Subdivision nine of section B1-2.0 of chapter one of the administrative code of the city of New York, as added by local law number ninety-seven of nineteen hundred sixty-five, is amended to read as follows:

9. The term "place of public accommodation, resort or amusement" shall include, except as hereinafter specified, all places included in the meaning of such terms as: inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation, rest, or restaurants, or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectionaries, soda fountains, and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises; retail stores and establishments dealing with goods or services of any kind, dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all other cleaning establishments, barber shops, beauty parlors, theatres, mo-

tion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies, or bureaus; public halls and public elevators of buildings and structures occupied by two or more tenants, or by the owners and one or more tenants. Such terms shall not include public libraries, kindergartens, primary and secondary schools, academies, colleges, and universities, extension courses, and all educational institutions under the supervision of the regents of the state of New York; any such public library, kindergarten, primary and secondary school, academy, college, university, professional school, extension course or other educational facility, supported in whole or in part by public funds or by contributions solicited from the general public; or any institution, club or place of accommodation which *proves that it is in its nature distinctly private. An institution, club or place of accommodation shall not be considered in its nature distinctly private if it has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business. For the purposes of this section a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or the religious corporations law shall be deemed to be in its nature distinctly private.*

No institution, club, organization or place of accommodation which sponsors or conducts any amateur athletic contest or sparring exhibition and advertises or bills such contest or exhibition as a New York state championship

contest or uses the words "New York state" in its announcements shall be deemed a private exhibition within the meaning of this section.

3. Paragraph c of subdivision two of section B1-8.0 of such chapter and code, as amended by local law number sixty-two of nineteen hundred seventy-three, is amended to read as follows:

(c) If, upon all the evidence at the hearing, the commission, or such members as may be designated, shall find that a respondent has engaged in any unlawful discriminatory practice as defined in this title, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, restoration to membership in any respondent labor organization, admission to or participation in a program, apprenticeship training program, on-the-job training program or other occupational training or retraining program, the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons, *evaluating applications for membership in a club that is not distinctly private without discrimination based on race, creed, color, national origin or sex*, payment of compensatory damages to the person aggrieved by such practice, as, in the judgment of the commission, will effectuate the purposes of this title, and including a requirement for report of the manner of compliance. If, upon all the evidence, the commission shall find that a respondent has not engaged in any such unlawful discriminatory practice, the commission shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing the said complaint as to such respondent. The commission shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereof.

4. Subdivision five of section B1-5.0 of such chapter and code, as amended by local law number ninety-seven of nineteen hundred sixty-five, is amended to read as follows:

(5) To hold hearings, compel the attendance of witnesses, administer oaths, take the testimony of any person under oath and in connection therewith to require the production of any evidence relating to any material under investigation or any question before the commission, *provided that the commission shall not require the production of names from a general membership list of any club that is a place of public accommodation.*

5. Subdivision two of section B1-7.0 of such chapter and code, as amended by local law number ninety-seven of nineteen hundred sixty-five, is amended to read as follows:

2. It shall be an unlawful practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin or sex of any person directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, or, directly or indirectly, to publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person belonging to or purporting to be any particular race, creed, color, national origin, or sex is unwelcome, objectionable or not acceptable, desired or solicited. Notwithstanding the foregoing the provisions of this paragraph shall not apply, with respect to sex, to places of public accommodation, resort or amusement where the Commission grants an exemption based on bona fide considerations of public policy. *Any place of accommodation which is required as a result of local law to construct or reconstruct locker room, shower, or other facilities shall be*

allowed one hundred eighty days from the effective date of this local law to complete such work, and during such one hundred eighty day period shall not be found to be in violation of the provisions of subdivision two of section B1-7.0 of the administrative code which apply to such facilities with regard to discrimination on account of sex. The commission, for good cause shown, may grant an extension not to exceed an additional ninety days of the period allowed such place of accommodation to complete such work.

§ 6. This local law shall take effect thirty days after it shall have become a law.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

<hr/>		x
NEW YORK STATE CLUB ASSOCIATION, :	:	
INC., :	:	
	:	VERIFIED ANSWER
<i>Plaintiff,</i> :	:	Index No.
<i>-against-</i> :	:	
	:	
THE CITY OF NEW YORK, <i>et al.</i> , :	:	
	:	
<i>Defendants.</i> :	:	
<hr/>		x

Defendants, by their attorney, FREDERICK A.O. SCHWARZ, JR., Corporation Counsel of the City of New York, as and for an answer to the complaint, hereby allege as follows:

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "1" of the complaint.
2. Admit the allegations contained in paragraphs "2" and "3" of the complaint.
3. Deny the allegations contained in paragraphs "4" and "5" of the complaint and respectfully refer the Court to §§B1-1.0 and B1-3.0-B1.5.0 of the Administrative Code of the City of New York ("Code") for a full and complete description of and statement of the duties and responsibilities of the New York City Commission on Human Rights. Defendants affirmatively state that it is the mandate of the New York City Commission on Human Rights to eliminate group prejudice, intolerance, bigotry and discrimination and to protect the rights of the inhabitants of the City of New York. Pursuant to that mandate, the New York City Commission on Human Rights is charged with

the enforcement of the City of New York's anti-discrimination law with respect to public accommodations. Local and state law ban discrimination in those places which are not "distinctly private." Local Law 513-A reasonably defines a place that is not "distinctly private" as including one that has "more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of non-members for the furtherance of trade or business." (A copy of Local Law 513-A is annexed hereto as Exhibit "1")

4. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "6" of the complaint.

5. Deny the allegations contained in paragraph "7" of the complaint and respectfully refer the Court to 42 U.S.C. §2000a(e), New York Executive Law §§ 290 *et seq.* and Code §B1-1.0 *et seq.* for a full and complete statement of their content. Defendants affirmatively state that Local Law 513-A was enacted to provide equal opportunity for women and minorities to pursue the professional and business advantages that accrue from membership in clubs that are not, in fact, "distinctly private" organizations as defined in Local Law 513-A. Such organizations, it has been found, have an important role in the professional business world, and are appropriately subject to regulation in that they regularly receive payments for nonmembers for the purpose of the furtherance of a trade or business. Despite the ongoing public activities and the public revenue sources that sustain these organizations, some of these clubs seek to claim the title "distinctly private" to sanction an exclusion from club membership based solely on sex, race, creed, color or national origin. This exclusion was found by the City Council to be a "barrier to the advancement of women and minorities in the business and professional life of the city." By setting forth the criteria for determining when clubs are not "distinctly private", the City

Council has made clear through the enactment of Local Law 513-A that these clubs are within the ambit of the City of New York anti-discrimination law.

6. Deny the allegations contained in paragraph "8" of the complaint except admit that on October 24, 1984, the City of New York enacted Local Law 513-A which amends Title B of the Administrative Code of the City of New York and respectfully refer the Court to a copy of Local Law 513-A for a full and complete statement of its content.

7. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "9" of the complaint.

8. Deny the allegations contained in paragraph "10" of the complaint and respectfully refer the court to Local Law 513-A and Code §§B1-8.0(c) and B1-10.0 for a full and complete statement of their content.

9. Deny the allegations contained in paragraphs "11", "12", "13" and "14" of the complaint and affirmatively state that it is a valid exercise of defendants' police power to seek the elimination of indivious [sic] discrimination in places that are not "distinctly private"; that Local Law 513-A is not pre-empted by state law; that plaintiff's federal and state constitutional rights do not include the right to discriminate in places that are not "distinctly private"; and that Local Law 513-A will not act to cause harm to plaintiff but will, upon information and belief, to the contrary, bring economic as well as other benefits both to plaintiff and its members and to those groups which have been excluded from membership in places that are not "distinctly private".

10. Deny the allegations contained in paragraph "15" of the complaint except admit that Local Law 513-A provides that it will become effective thirty days after its enactment.

11. Deny the allegations contained in paragraph "16" of the complaint and affirmatively state that enforcement of Local Law 513-A is being held in abeyance pending the promulgation and adoption of regulations pertaining to that law.

12. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "17" of the complaint.

**AS AND FOR A
FIRST DEFENSE:**

13. The Court lacks subject matter jurisdiction over the allegations contained in the complaint.

**AS AND FOR A
SECOND DEFENSE:**

14. The allegations of the complaint are not ripe for adjudication and the complaint should be dismissed.

**AS AND FOR A
THIRD DEFENSE:**

15. Plaintiff lacks standing to prosecute this action and the complaint should be dismissed.

**AS AND FOR A
FOURTH DEFENSE:**

16. The complaint fails to state a cause of action upon which relief may be granted.

**AS AND FOR A
FIFTH DEFENSE:**

17. Local Law 513-A is in all respects lawful and proper and is consistent with the Constitution and federal laws,

the Constitution and laws of the State of New York and with all other local laws and ordinances.

**AS AND FOR A
SIXTH DEFENSE:**

18. Local Law 513-A does not deprive plaintiff or its members of the right of privacy, freedom of association, freedom of speech, equal protection or due process nor does it constitute an unlawful bill of attainder in contravention of Article 1 §10 of the United States Constitution.

**AS AND FOR A
SEVENTH DEFENSE:**

19. Local Law 513-A is not preempted by or otherwise inconsistent with New York State Executive Law §§ 290 *et seq.*

**AS AND FOR AN
EIGHTH DEFENSE:**

20. Local Law 513-A is a proper and valid exercise of the police power of the City of New York and is neither arbitrary, capricious nor unreasonable.

WHEREFORE, defendants respectfully request that the complaint be dismissed in its entirety with costs, disbursements, attorneys' fees and such other and further relief as to the Court seems just and proper.

Dated: New York, New York
November 20, 1984

FREDERICK A.O. SCHWARZ, JR.
Corporation Counsel
Attorney for Defendants
100 Church Street Room 6C38
New York, N.Y. 10007
(212) 566-2097

[Exhibit 1 to Verified Answer (Local Law 63) has been omitted here because reproduced in this appendix in its chronological place in the proceedings at pages JA 14-20, *supra*.]

— x Index No. 25028/84

Plaintiff,

-against-

Defendants.

NOTICE OF MOTION FOR
SUMMARY JUDGMENT

S I R S:

PLEASE TAKE NOTICE that upon the affidavit of Walter S. de la Plante, sworn to on the 16th day of April, 1985, the summons, verified complaint, verified answer and upon all proceedings had herein, a motion pursuant to CPLR § 3212 will be made at a Special Term of this Court to be held at the Courthouse thereof, located at 60 Centre Street, New York, New York on the 3rd day of May, 1985, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order striking out defendants' answer and directing the entry of summary judgment in favor of the plaintiff and against the defendants for the relief demanded in the complaint, upon the ground that there is no defense to the cause of action alleged in the verified complaint and for such other and further relief as may be just, proper and equitable.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR § 2214(b) and New York County Court Rule

§ 660.8(a)(3) answering papers, if any, are required to be served upon the undersigned in a manner calculated to be received by the undersigned at least seven days before the return date of this motion.

Dated: New York, New York
April 17, 1985

PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON

Attorneys for Plaintiff
40 West 57th Street
New York, NY 10019
(212) 977-9700

TO: FREDERICK A.O. SCHWARZ, JR.,
Corporation Counsel
Attorney for Defendants
100 Church Street
New York, NY 10007
(212) 566-0745

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

x Index No. 25028/84

NEW YORK STATE CLUB ASSOCIATION, :
INC., :

Plaintiff, :

-against-

: AFFIDAVIT IN SUPPORT
: OF MOTION FOR
: SUMMARY JUDGMENT

THE CITY OF NEW YORK, THE MAYOR :
OF THE CITY OF NEW YORK, THE :
CITY HUMAN RIGHTS COMMISSION and :
THE MEMBERS OF THE CITY HUMAN :
RIGHTS COMMISSION, :

Defendants. :

x

STATE OF NEW YORK)
) ss.:
COUNTY OF ERIE)

WALTER S. de la PLANTE, being duly sworn, deposes and says:

1. I am the president of the New York State Club Association ("NYSCA"), the plaintiff herein. I submit this affidavit in support of plaintiff's motion for a summary judgment declaring, under CPLR 3001, Local Law 513-A unconstitutional and void because it is inconsistent with the general law of New York State.

Local Law 513-A Is an Unconstitutional Amendment to New York City's Anti-Discrimination Law.

2. On October 24, 1984, the Mayor of the City of New York signed into law Local Law 513-A* which amends Title

* Subsequent to its enactment, this law was denominated Local Law

B of the Administrative Code of the City of New York. A copy of Local Law 513-A is annexed hereto as Exhibit A. In general terms, Title B proscribes discriminatory practices in "places of public accommodation" in the City of New York, and creates the City Human Rights Commission to enforce its provisions. Local Law 513-A eliminates the exclusion from anti-discrimination legislation heretofore accorded to private clubs located in the City of New York both by State law and the prior City law. It does so by re-defining "places of public accommodation" to include private City clubs, thereby treating them in the same manner as restaurants, theatres, hotels and retail stores.

3. Local Law 513-A effects a radical change in the legal definition of "place of public accommodation," so as to severely encroach on the constitutional rights of NYSCA and the private clubs it represents. Unless a private club or association affirmatively proves that it does not (1) have more than 400 members, (2) regularly provide food services, and (3) regularly receive payment for dues, fees, use of space, facilities, services, meals or beverages, directly or indirectly from or on behalf of non-members for the furtherance of trade or business, such club or association will automatically lose its status as a distinctly private club and will be subject to the full panoply of the anti-discrimination and enforcement provisions of the Administrative Code of the City of New York applicable to places of public accommodation.

4. In addition, the requirement that a private club must affirmatively prove that a member has not been reimbursed by a nonmember creates, in effect, an irrebuttable presumption that a private club is a place of public accommodation. Private City clubs cannot possibly monitor

63 of 1984. For purposes of consistency with the complaint and prior proceedings herein, however, the designation "Local Law 513-A" will be continued in this motion.

or retrieve all the information sought under the third prong of this test without interfering with the privacy of their members. Moreover, as more fully set forth in the accompanying memorandum of law, this litmus-test provision has nothing to do with measuring whether a club is in fact distinctly private in its policies or operations.

5. Local Law 513-A illegally attempts to supersede and invalidate the State law which governs discrimination in private clubs. New York has a two-tiered statutory scheme of anti-discrimination legislation. State law, as embodied in Executive Law § 292, affirmatively protects the association and privacy rights of private clubs throughout the State by providing a "distinctly private" exemption to the State's anti-discrimination laws. By judicial construction, this exemption focuses on whether a club's activities are truly "private" in nature. Local Law 513-A, however, repudiates that exemption by subjecting private clubs situated in the City to anti-discrimination legislation despite the fact that the very same clubs are immune from such legislation by reason of affirmative State protection. Moreover, there can be no question that the City intended to invalidate State protection because prior to the enactment of 513-A the City law was virtually identical to the State law.

6. Plaintiff makes this motion for summary judgment on the ground that Local Law 513-A is inconsistent with State law and therefore violates the New York State Constitution. This issue presents a pure question of law for this Court's consideration, and no disputed issues of material fact exist which in any way preclude a prompt resolution of the inconsistency clause challenge. Indeed, the patent illegality of Local Law 513-A makes summary judgment disposition particularly appropriate at this time.

The Parties

7. NYSCA is a not-for-profit corporation duly incorporated under the laws of the State of New York and has

its principal place of business in Rochester, New York. A copy of NYSCA's Certificate of Incorporation is annexed hereto as Exhibit B.

8. NYSCA's membership is composed of 125 private clubs and associations in the State of New York, a substantial number of which are located in the City of New York. The operation and effect of Local Law 513-A will require a drastic alteration of the fundamental policies and, indeed, *raison d'être* of these member clubs and associations. A significant number of these members intentionally have been organized along national origin, religious, ethnic and gender lines; others have been formed primarily for the social and athletic benefits they provide. Almost all of NYSCA's New York City members have more than 400 members and provide regular meal service.

9. The hallmark of NYSCA's City club members is that they steadfastly adhere to exacting standards in their admissions policies, governance and administration of their facilities. Selectivity is of critical importance to these clubs because their purpose is ultimately to provide a comfortable and congenial social atmosphere for individuals who have elected to associate and to engage in political, academic, social and/or recreational interchange with one another on a regular and continual basis. The facilities, services and, for some, dining rooms of these clubs are available solely to their membership and *bona fide* guests. These clubs are operated on a non-profit basis for the pleasure of their membership, and their publicity is not directed at the public at large, but rather, is limited to their members. NYSCA and its members are the antitheses of public institutions, and until now have come within specific federal and state exclusions in public accommodation laws.

10. The principal purpose of NYSCA, as set forth in its Certificate of Incorporation, is the promotion of its mem-

bers' common interests through the performance of various functions. Among these are:

- "(1) Dissemination to all Members information (especially legislative, legal and tax information) of general interest to them, and to each category of Members information of special interest to them.
- (2) Representation for all of the members or for any category of the Members, when authorized by the Board of Directors to do so.
- (3) Provision for the exchange of views and information of mutual interest among the Members.
- (4) Taking such action as the Board of Directors may authorize to protect and further the common interests and objectives of the members."

See Exhibit B, p.2. In addition, NYSCA has provided a structured forum for communication and the dissemination of information by and among its membership, and has taken steps to protect the constitutional rights of its members in both the political and legislative spheres.

11. For example, prior to the enactment of Local Law 513-A, the New York City Council held hearings and solicited comments from interested parties on both a prior draft of the bill and Local Law 513-A. At the Council's invitation, NYSCA engaged in an extensive dialogue with the Council, and made both written submissions and oral presentations. In one instance, NYSCA informed the Council that, as a matter of federal constitutional law, membership lists of private organizations are protected from disclosure and ought not be subject to subpoena by the City Human Rights Commission. Local Law 513-A, as enacted, makes membership lists exempt from the Commission's subpoena power.

12. The defendants in this action include the Mayor, who signed the bill into law, and the City Human Rights Commission and its individual members. As stated above, the City Human Rights Commission is the City agency charged with the responsibility for enforcing the City Human Rights Law. It is specifically empowered to investigate alleged charges of discrimination, either on its own initiative or upon receipt of a complaint, in, *inter alia*, places of public accommodation. It has specific authority to take proof, issue subpoenas, administer oaths, and require the production of certain evidence. Interference with the performance of the Commission's duties is punishable as a criminal misdemeanor.

Prior Proceedings in This Action

13. Prior to the enactment of Local Law 513-A by the City Council, the Board of Directors of NYSCA authorized its counsel to institute this action. The amendment was signed into law by the Mayor on October 24, 1984 and on October 25, 1984, this action was commenced. A copy of the summons and verified complaint is annexed hereto as Exhibit C. By its verified complaint, NYSCA seeks a judgment pursuant to CPLR 3001 declaring Local Law 513-A unconstitutional and barring its enforcement. Issue was joined on November 20, 1984, and a copy of the answer is annexed hereto as Exhibit D.

14. NYSCA challenges Local Law 513-A as unconstitutional because it violates NYSCA's members' constitutional rights of privacy, freedom of association, freedom of speech, equal protection and due process of law. In addition, the enactment of Local Law 513-A constitutes an unlawful bill of attainder, violates the constitution of the State of New York and is a capricious and arbitrary exercise of police power by the City of New York.

15. NYSCA also moved for a preliminary injunction simultaneously with service of the verified complaint, asserting that its members would suffer immediate and

irreparable harm upon the enforcement of Local Law 513-A, which was scheduled to begin 30 days after its enactment.

16. On November 7, 1984 the City responded to plaintiff's motion. In an affidavit submitted by Alberta Fuentes, Executive Director of The City of New York Commission on Human Rights, the defendant Human Rights Commission attested that it would neither initiate nor investigate complaints of unlawful discriminatory practices arising from Local Law 513-A until such time as the Commission had concluded the promulgation of rules and regulations aimed, in part, at defining some of the very terms the plaintiff had argued were unconstitutionally vague. This voluntary stay continues today because no rules or regulations have thus far been enacted, and, as far as I am aware, neither the City nor the Human Rights Commission has yet attempted any enforcement of Local Law 513-A.

17. On November 9, 1984, oral argument on the preliminary injunction motion was heard by Special Term, which denied plaintiff's motion for a preliminary injunction on November 30, 1984, but noted that the motion could be renewed when the City had passed the regulations. NYSCA appealed Special Term's order to the Appellate Division, First Department. The order was affirmed on the sole ground that rules and regulations had still not been promulgated.

NYSCA Is Entitled to Summary Judgment on Its Motion Because Local Law 513-A Is Patently Inconsistent With State Law.

18. As more fully set forth in the accompanying memorandum of law, until the passage of Local Law 513-A, the New York City clubs were free to conduct their affairs privately, without intrusion by government or third parties. Now, despite continued recognition by New York State of their constitutional right of privacy, the City of

New York has unilaterally determined that the New York City private clubs are to be judged by a blatantly inconsistent local standard. Although distinctly private organizations under federal and State law, unless the New York City clubs affirmatively prove that they satisfy Local Law 513-A's inconsistent criteria, they will be deemed "public accommodations" for City of New York anti-discrimination law purposes. Thus not only has the definition of "private" clubs been reformulated, but further, an illegal presumption has now been created which in itself creates an impermissible divergence from both State law and elementary notions of fairness.

19. The protracted legislative history of Local Law 513-A and its predecessor bills, in conjunction with widespread news media coverage thereof, indicates the significance of the issues involved here. Just by way of example, according to Gales' Encyclopedia of Associations (14th ed. 1980), more than 600,000 people in New York State are members of formal organizations which limit their membership on grounds of race, religion, sex or national origin. Each of these organizations and its membership have a strong stake in a prompt judicial ruling of the local law's unconstitutionality. While NYSCA in no way opposes the imposition of anti-discrimination laws on truly public places of accommodation, it is the City of New York's effort to transform, by legislative fiat, heretofore distinctly private organizations into places of public accommodation which cannot pass constitutional muster.

WHEREFORE, for the reasons stated above and in the accompanying memorandum of law, NYSCA respectfully requests that this Court direct the entry of summary judgment in its favor, declaring Local Law 513-A unconstitutional and awarding such further relief which is equitable and just.

WALTER S. DE LA PLANTE

Sworn to before me this
day of April, 1985

Notary Public

[Exhibit A to Affidavit in Support of Motion for Summary Judgment (Local Law 63) has been omitted here because reproduced in this appendix in its chronological place in the proceedings at pages JA 14-20, *supra*.]

**CERTIFICATE OF INCORPORATION
OF**

NEW YORK STATE CLUB ASSOCIATION, INC.

Under Section 402 of the Not-for-Profit Corporation Law

The undersigned, being over the age of 19 years, for the purpose of forming a corporation under Section 402 of the Not-for-Profit Corporation Law does hereby certify as follows:

FIRST: The name of the corporation shall be New York State Club Association, Inc.

SECOND: The corporation is a corporation as defined in Section 102(a)(5) of the Not-for-Profit Corporation Law and shall be a Type A corporation under Section 201(b) of the Not-for-Profit Corporation Law.

THIRD: The purpose for which this corporation is formed is to promote the common business interests of its Members, consisting of social clubs, golf clubs, tennis clubs, yacht clubs, and other private clubs of the State of New York engaged in the operation of club facilities for the benefit of their respective memberships, through the performance of the following functions:

- (1) Dissemination to all Members information (especially legislative, legal and tax information) of general interest to them, and to each category of Members information of special interest to them.
- (2) Representation for all of the Members or for any category of the Members, when authorized by the Board of Directors to do so.
- (3) Provision for the exchange of views and information of mutual interest among the Members.
- (4) Taking such action as the Board of Directors may authorize to protect and further the common interests and objectives of the Members.

FOURTH: No part of the net earnings of the corporation shall inure to the benefit of any Member, director, or officer of the corporation, or any private individual, except that reasonable compensation may be paid for services rendered to or for the corporation affecting one or more of its purposes.

Upon the dissolution of the corporation or the winding up of its affairs, the assets of the corporation shall be distributed in the manner prescribed in Section 1005 of the Not-for-Profit Corporation Law, and the net assets remaining after the corporation's debts, obligations and liabilities have been paid or adequately provided for shall be divided among the Members proportionately according to the total amount of dues and assessments paid by them, respectively, during the year in which such distribution is made and the next preceding year.

Notwithstanding any other provisions of this certificate, the corporation shall not conduct or carry on any activities not permitted to be conducted or carried on by an organization exempt under Section 501(c) of the Internal Revenue Code and its Regulations as they now exist or as they may hereafter be amended.

FIFTH: The office of the corporation is to be located in the City of Rochester, County of Monroe and State of New York.

SIXTH: The territory in which the activities of the corporation are principally to be conducted is the State of New York.

SEVENTH: The post office address to which the Secretary of State shall mail copies of any notice required by law is 31 East Main Street, Rochester, New York, 14614.

EIGHTH: All approvals and consents required under the Not-for-Profit Corporation Law are annexed to this Certificate.

IN WITNESS WHEREOF, I have signed this Certificate of Incorporation this 27th day of July, 1972.

 RAE A. CLARK
 31 East Main Street
 Rochester, New York 14614

[Acknowledgement and Approval of Justice omitted in printing]

[Exhibit C (Summons and Verified Complaint) and Exhibit D (Verified Answer) to Affidavit in Support of Motion for Summary Judgment have been omitted here because reproduced in this appendix in their chronological places in the proceedings at pages JA 7-13 and JA 21-26, *supra*, respectively.]

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK

_____	x
NEW YORK STATE CLUB ASSOCIATION, :	
INC., :	
Plaintiff, :	NOTICE OF
against- :	CROSS-MOTION
THE CITY OF NEW YORK, THE MAYOR :	Index No. 2528/84
OF THE CITY OF NEW YORK, THE :	
CITY HUMAN RIGHTS COMMISSION and :	
THE MEMBERS OF THE CITY HUMAN :	
RIGHTS COMMISSION, :	
Defendants. :	
_____	x

PLEASE TAKE NOTICE, that upon the annexed affirmation of Carolyn Hirshleifer, Esq., dated May 24, 1985, and upon all prior pleadings and proceedings, defendants will move this Court at a Special Term Part I thereof at the courthouse located at 60 Centre St., New York, New York, on the 7th day of June, 1985, at 9:30 a.m. or as soon thereafter as counsel can be heard, for an order pursuant to Rule 3212 of the Civil Practice Law and Rules granting defendants summary judgment and for such other and further relief as the Court deems just and proper.

Dated: New York, New York

May 24, 1985

FREDERICK A.O. SCHWARZ, JR.
 Corporation Counsel
 Attorney for defendants

CAROLYN HIRSHLEIFER, of Counsel
 100 Church St.-Rm. 6-C-38
 New York, New York 10007
 212-566-2097

To: PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
Attorneys for Plaintiff
 40 West 57th St.
 New York, New York 10019
 212-977-9700

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK

<hr/>		x
NEW YORK STATE CLUB ASSOCIATION, :	:	
INC., :	:	
	:	
<i>Plaintiff,</i>	:	AFFIRMATION
	:	Index No. 25028/84
	:	
-against-	:	
THE CITY OF NEW YORK, THE MAYOR :	:	
OF THE CITY OF NEW YORK, THE :	:	
CITY HUMAN RIGHTS COMMISSION and :	:	
THE MEMBERS OF THE CITY HUMAN :	:	
RIGHTS COMMISSION, :	:	
	:	
<i>Defendants.</i>	:	
<hr/>		x

CARYN M. HIRSHLEIFER, an attorney admitted to practice before the Courts of the State of New York, affirms under penalty of perjury, as follows:

1. I am an Assistant Corporation Counsel in the office of FREDERICK A.O. SCHWARZ, JR., Corporation Counsel of the City of New York, attorney for defendants. This affirmation is submitted in support of defendants' cross-motion for summary judgment pursuant to CPLR 3212 dismissing the complaint in its entirety and in opposition to plaintiff's motion for partial summary judgment.

2. This action was commenced in October, 1984. Plaintiff seeks a declaration that Local Law 513-A,* an amendment

* The law which plaintiff challenges was designated, in bill form, as "Introductory 513-A". After it was signed into law by the Mayor of the City of New York, it became Local Law No. 63. The law will be referred to here as Local Law 513-A.

to the Administrative Code of the City of New York ("Code") enacted into law on October 24, 1984, is unconstitutional on both state and on federal grounds. A copy of the complaint is annexed hereto as Exhibit "A".

3. Local Law 513-A amends portions of Chapter 1, Title B of the Code which empowers the New York City Commission on Human Rights ("Commission") to initiate and investigate complaints of "unlawful discriminatory practices" within the meaning of the Code.

4. "Unlawful discriminatory practices" under the Code include invidious discrimination in places of public accommodation. Code §B1-7.0(2). "Distinctly private" places of accommodation are not covered by that law and thus are not subject to investigation or enforcement by the Commission.

5. Local Law 513-A amends Chapter 1, Title B of the Code to provide, *inter alia*, criteria for determining when a place of accommodation is "distinctly private." Specifically, the law provides as follows:

[a]n institution, club or place of accommodation shall not be considered in its nature distinctly private if it has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, uses of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business.

A copy of Local Law 513-A is annexed hereto as Exhibit "B".

6. Subsequent to service of the complaint, plaintiff applied to this court for a preliminary injunction to enjoin enforcement of the law pending a determination on the merits of its claims. In support of its motion, plaintiff advanced arguments that Local Law 513-A is unconstitutional because it is inconsistent with the State Human Rights Law and

violative of federal constitutional rights to privacy and free association. Plaintiff also argued that the law is overbroad, impermissibly vague and denies plaintiff equal protection of the laws.

7. Plaintiff's motion for a preliminary injunction was denied by this Court at Special Term (Greenfield, J.) by decision dated November 30, 1984. There, the Court found that plaintiff could not demonstrate a likelihood of success on the merits or irreparable injury absent injunctive relief. A copy of the decision at Special Term is annexed hereto as Exhibit "C".

8. The Court at Special Term rejected plaintiff's argument that Local Law 513-A violated federal constitutional rights. Although that law arguably may limit an individual's choice to associate only with persons of a particular sex, color, or creed, the Court noted that all anti-discrimination statutes act to subordinate personal rights and interests to the overriding principle of equity. Moreover, the Court found, invidious discrimination of the type espoused by plaintiff, is not entitled to affirmative constitutional protection. *See* Exhibit "C".

9. Plaintiff's contention that the local law is inconsistent with the State Human Rights Law was also found by this Court to be without merit. To the contrary, recent interpretation of that public accommodation anti-discrimination law by the Court of Appeals in *Power Squadrons v. State Human Rights Appeal Board*, 59 N.Y.2d 401 (1983), reveals that the state law is not to be strictly construed. Special Term noted that the factors enumerated in *Power Squadrons* for determining whether a place is a "public accommodation" are not the "sole and exclusive standards" and that the test set forth in the local law for making that determination contained nothing inconsistent with the guidelines outlined by the Court of Appeals. *See* Exhibit "C".

10. Special Term also found no merit to plaintiff's argument that the law is overbroad. Likewise, as to the issue

to vagueness, the Court found that even without further definition,* the terms used are of "sufficient precision so that a common sense application on an *ad hoc* case by case basis could proceed." See Exhibit "C".

11. Plaintiff appealed the order of Special Term denying the motion for a preliminary injunction to the Appellate Division, First Department and raised there the same legal arguments as presented to Special Term. On March 7, 1985, the Appellate Division affirmed the denial of the preliminary injunction adding that preliminary relief would be premature inasmuch as regulations had not been issued by the Commission. A copy of the Appellate Division decision is annexed hereto as Exhibit "D".

12. Plaintiff now moves for summary judgment pursuant to CPLR 3212 on the sole ground that Local Law 513-A is inconsistent with the State Human Rights Law. Plaintiff does not now advance other legal arguments previously raised before this Court and at the Appellate Division.

13. Defendants, having answered the complaint (a copy of defendants' answer is annexed hereto as Exhibit "E"), now cross-move for summary judgment. Because, as this

* In opposition to plaintiff's motion for preliminary relief, defendants submitted the affidavit of Alberta Fuentes, Executive Director of the Commission, in which she stated that the local law was not currently being enforced, nor were complaints being initiated or investigated. These measures, she explained, were being held in abeyance pending the promulgation of regulations to accompany the law. At that time, it was contemplated that the regulations would provide definitions for some of the terms used in the local law that plaintiffs contended were vague. Recently, on or around May 10, 1985, the Commission issued proposed regulations to the New York City Council, the press, community groups and other interested parties for public comment, and pursuant to Section 1105 of the New York City Charter, the proposed regulations are scheduled to be published in the City Record. After comments are received by the Commission and any changes deemed necessary are made, the final regulations will become effective on August 1, 1985.

Court has preliminarily determined, all of plaintiff's grounds for relief lack merit, defendants cross-move for a judgment as to all of plaintiff's claims and request that the complaint be dismissed in its entirety.*

14. As more fully discussed in defendants' accompanying memorandum of law, plaintiff's contention that Local Law 513-A violates federal constitutional rights to privacy and free association is without merit.

15. The right to privacy extends only to small and exclusive associations where activities and decision making is limited to the participating individuals and necessarily so because of the intimate and confidential nature of the association. Thus, only affiliations involving the family have heretofore enjoyed a constitutionally protected right to privacy or, as it recently has been demoninated, the right of "intimate association". Because Local Law 513-A is not applicable unless an organization has more than 400 members, serves meals and unless it regularly derives financial support from individuals outside of the organization, it is frivolous to argue that the law in any way impinges on this constitutional right.

* Subsequent to Special Term's decision denying plaintiff a preliminary injunction, defendants served interrogatories on plaintiff requesting information concerning, *inter alia*, the identity of clubs plaintiff purports to represent in this action and the nature of the effect, if any, of the local law on these clubs. After affording plaintiff lengthy adjournment totalling more than 60 days in which to respond to these interrogatories, plaintiff finally responded by refusing to provide any information regarding the clubs whose interests it allegedly seeks to protect and who are, apparently, the institutions allegedly adversely affected by the Local Law. The blanket objection interposed by plaintiff to defendants' queries was that the information called for was "irrelevant, confidential and improper." While defendants do not recognize the legitimacy of these objections (indeed, it is difficult to comprehend on what legal basis an objection to "confidential" and "improper" information can rest), in the interests of expediting disposition of this matter, defendants have not, as of this time, taken action to secure proper responses to their interrogatories.

16. Nor does Local Law 513-A impermissibly infringe on any claimed right to associate free from intrusion by a particular sex or by minorities. Indeed, it is questionable at the outset, as Special Term has found, that plaintiff can invoke the Constitution to advance their invidiously discriminatory practices. Moreover, the Supreme Court has not recognized and has implicitly rejected the notion that a freedom to associate exists absent a *raison d'être* for the association based on traditional first amendment principles.

17. But, in any event, the local law does not violate a right to free association. The law is not "content-based", i.e., it does not preclude associations of individuals based on the principles espoused by the organization, but simply directs that the association not foreclose participation in group activity to individuals on invidiously discriminatory grounds.

18. Moreover, even assuming *arguendo* that the local law infringed on plaintiff's right to free association, it cannot be disputed, and it has been conclusively established by the United States Supreme Court, that defendants have a compelling interest in the legislation sufficient to justify an impact on associational rights.

19. Plaintiff has also argued before this Court, heretofore unsuccessfully, that Local Law 513-A is overbroad. Because the doctrine of overbreadth is sparingly and reluctantly invoked by the courts, and then usually only in cases concerning restrictions on "pure speech", the overbreadth doctrine cannot be relied upon here by plaintiff. The local law, however, easily survives an overbreadth analysis.

20. As mentioned above, the local law is not aimed at, and indeed disclaims any intent to interfere with activities engaged in by the organizations coming within its scope. The clubs are free to pursue their activities, regardless of whatever political, social, or recreational form they make take. Rather, because these organizations have been identified as places where business and professional interests

are fostered and advanced, and because the exclusion of women and minorities from these organizations deprives these groups of career advantages, the City Council has mandated only that these organizations not foreclose participation in their activities on grounds that are invidiously discriminatory. In this fashion, the local law addresses the precise evil which the City Council desired to eliminate—foreclosure of business and professional opportunities to historically disadvantaged groups—and does so without any unnecessary infringement on first amendment rights.

21. Moreover, Local Law 513-A is not void for impermissible vagueness. A law is void for vagueness if it (1) fails to provide an individual of ordinary intelligence with a reasonable opportunity to know what is prohibited and (2) makes for arbitrary and discriminatory enforcement.

22. In a vagueness challenge, the degree of clarity required and the relative importance of fair warning and discriminatory enforcement depend on the nature of the law in question. Enactments with civil rather than criminal penalties are subject to a less strict vagueness test. Greater specificity is required of laws infringing on constitutionally protected rights. Regardless of the nature of the law, however, it is clear that absolute precision in drafting laws is not demanded.

23. Local Law 513-A imposes only civil penalties upon a club which has been found after a hearing to have engaged in an unlawful discriminatory practice in violation of the City Human Rights Law. Moreover, Local Law 513-A, as pointed out *supra*, does not impermissibly impinge upon any constitutionally protected activities. Thus, it is subject to the least stringent vagueness test. Assuming *arguendo*, however, that Local Law 513-A is found to implicate first amendment protected activity, the law is sufficiently clear on its face to pass constitutional muster.

24. Plaintiff has argued that Local Law 513-A is impermissibly vague in failing to set forth the qualifications which

determine whether a club has 400 "members", what it means to "provide regular service" and how one determines whether a club "regularly receives payment directly or indirectly from nonmembers". It is also argued that the term "furtherance of trade or business" is imprecise. As set forth in the accompanying memorandum of law, all of these terms are sufficiently clear to provide adequate notice of what conduct is proscribed by the local law.

25. Moreover, there is no merit to plaintiff's assertion that Local Law 513-A makes for arbitrary and selective enforcement and thereby offends due process. Such an argument is unavailing in this pre-enforcement facial attack on Local Law 513-A because the United States Supreme Court has held that regardless of the risk of discriminatory enforcement, a court may not hold that that risk invalidates a statute in a pre-enforcement facial challenge. Such a claim takes on due process implications only when prosecution under that statute has been undertaken.

26. Plaintiff also argues that the exemption in Local Law 513-A for benevolent orders and religious corporations renders the law violative of the equal protection clause. A statute will generally comport with the equal protection clause if it is rationally related to a permissible public purpose. If a fundamental right is involved, a statute will be upheld on equal protection grounds if the state can demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. The infringement must be the least burdensome means available for attaining the governmental objective.

27. As pointed out earlier, no fundamental rights are impermissibly infringed by Local Law 513-A. Any claimed right to associate for the purposes of discrimination is not accorded constitutional protection. Thus, the constitutionality of Local Law 513-A should be upheld because it is rationally related to a permissible public purpose. Even assuming that this Court applied the heightened scrutiny test

to Local Law 513-A, it should be upheld, nonetheless, because it is precisely tailored to serve a compelling governmental interest.

28. As pointed out, *supra*, the United States Supreme Court has recognized that the State has a compelling governmental interest in eradicating discrimination in public places and in fostering equal employment opportunities. Local Law 513-A serves to foster that legitimate governmental interest.

29. As the Local Law's Legislative Declaration and the testimony before the City Council demonstrate, a barrier to the advancement of women and minorities in the business and professional life of the City is the discriminatory practices of certain clubs where business deals are frequently made and personal contacts essential to the promotion of professional advancement are developed. The City Council found that this business activity often occurs at clubs having more than four hundred members which provide regular meal service whereby the opportunity is presented for persons to discuss business. At these clubs, the dues and expenses of members are paid by their employers, because the employee's activities at the club help to develop the employer's business. The organizations also rent their facilities through members for use as conference rooms for business meetings attended by nonmembers.

30. Local Law 513-A sets forth a test which will properly bring within the ambit of the City Human Rights Law, clubs in which business is going on to the benefit of nonmembers - clubs which are, therefore, not exclusive and so undeserving of the "distinctly private" exemption contained in the City Human Rights Law.

31. Exempting benevolent organizations and religious corporations from the ambit of the City Human Rights Law is perfectly consistent with the purposes of Local Law 513-A and in fact is constitutionally mandated in view of the

requirement that a legislative classification be as narrowly tailored as possible.

32. As stated, Local Law 513-A is aimed at bringing within the City Human Rights Law's enforcement mechanisms, those clubs which are not private because the financial and other benefits to be derived from membership and participation in club activities regularly inure to non-members. In contrast, benevolent orders (also referred to as beneficial associations, benefit societies, or fraternal or friendly societies), by statute, are organizations which are formed primarily for the protection or relief of their members or their dependents. By statutory definition, these societies are not public, and a failure to exempt them from Local Law 513-A would be improper.

33. Similarly, exemption of religious corporations is consistent with the purposes of Local Law 513-A. A "religious corporation" is defined as "a corporation created for religious purposes." N.Y. Rel. Corp. Law § 2. A religious corporation could either be an incorporated church created to enable its members to meet for worship or other religious observances or an incorporated congregation, society, or other assemblage, accustomed to meet for the same purpose. Clearly, religious corporations would not be the type of organizations which would be engaging in commercial activity for the benefit of nonmembers. Thus, their activities fall outside the scope of the City's legitimate interests in enacting Local Law 513-A and exemption from that law's coverage is therefore proper.

34. It is instructive to note, moreover, that religious corporations and benevolent orders are themselves the subject of separate and distinct bodies of legislative enactment, the Religious Corporations Law and the Benevolent Orders Law. The legislature has thus clearly indicated that these groups are subject to special, if not always different, treatment in the eyes of the law. Indeed, in other areas of legislation,

benevolent orders have been singled out or exempted from legislative enactments.

35. Plaintiff also urges that Local Law 513-A is inconsistent with the State Human Rights Law and the constitution of the State of New York. This argument lacks merit. A local law will not be struck down on the ground of preemption unless it is inconsistent with the state constitution or any general law or unless it regulates in an area where the state legislature has evidenced an intent to preempt the field. Local Law 513-A is not inconsistent with the State Human Rights Law because the state does not evince an intent to preempt the field of regulation of discrimination in places of public accommodation.

36. The mere fact that a local law may touch on some of the matters addressed by state law does not automatically invalidate that local law. Rather, it is only when the state has evinced an unmistakable desire to avoid the possibility that the local legislation will not be on all fours with that of the state that the municipality is powerless to act.

37. The State Human Rights Law nowhere expressly states or impliedly indicates an intent to reserve to the state exclusive power to legislate in this area. To the contrary, the nature of the subject matter being regulated and the purpose and scope of the state legislative scheme suggest the propriety of complementary local legislation.

38. Nor is Local Law 513-A inconsistent with the State Human Rights Law so as to be pre-empted by it. Local Law 513-A merely supplements the State Human Rights Law and does not prohibit what the law permits nor allow what the law forbids.

39. Local Law 513-A's amplification of the term "distinctly private" as used in the State Human Rights Law is not inconsistent with state law. Indeed, Local Law 513-A fully complies with the criteria which are to be used in determining if a club or association comes within the 'dis-

tinently private" exemption, as set forth in *United States Power Squadrons v. State Human Rights Appeal Board*, 59 N.Y.2d 401 (1983).

40. The factors prescribed by the Court of Appeals included:

- (1) Whether the club had permanent machinery established to carefully screen applicants;
- (2) The limitation of the use of the club's facilities and services to its members and to their *bona fide* guests;
- (3) The club is controlled by the membership;
- (4) The club is non-profit and is operated solely for the benefit and pleasure of the members; and
- (5) The club directs its publicity only to members for their information and guidance.

41. In applying these factors, the Court of Appeals determined that although the Power Squadrons was a club controlled by its members, it was tinged with a public purpose because, *inter alia*, the club encouraged public participation in its membership, it did not attempt to limit its services to members only, and it did not operate its programs solely for the benefit of its members. *Id.* at 413.

42. The proposed amendment to the City's Human Rights Law is consistent with the Court of Appeals interpretation of the State Human Rights Law's "distinctly private" exemption. Both the Court of Appeal's interpretation of "distinctly private" and Local Law 513-A's three-pronged test do not protect clubs or associations which are tinged with a public purpose. Clubs where nonmembers regularly make payments in furtherance of their trade or business are not being operated "solely for the benefit and pleasure of the members" nor are they limiting their use of facilities to "members and *bona fide* guests of members." Such clubs are serving the needs of the business community to have employees seek out contacts and develop opportunities for

new business. As in *Power Squadrons*, such clubs have "become affected with a public interest." *Id.* at 414. Local Law 513-A is therefore consistent with *Power Squadrons* in excluding these public entities from the protection of the Human Rights Law. Accordingly, the local law is not preempted by the State Human Rights Law or by the state constitution.

WHEREFORE, the Court should deny plaintiff's motion for partial summary judgment and it should grant defendants' cross-motion for summary judgment dismissing the complaint in its entirety, with costs, disbursements, fees and all further relief deemed just, proper and equitable.

Dated: New York, New York
May 24, 1985

CARYN M. HIRSHLEIFER

[Exhibit A (Summons and Verified Complaint) and Exhibit B (Local Law 63) to Affirmation in Support of Cross-Motion for Summary Judgment and in Opposition to Motion for Summary Judgment have been omitted here because reproduced in this appendix in their chronological places in the proceedings at pages JA 7-13 and JA 14-20, *supra*, respectively.]

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:SPECIAL TERM, PART I**

_____ x	
NEW YORK STATE CLUB ASSOCIATION, :	
INC., :	
Plaintiff, :	Index No. 25028/84
:	#185 Nov. 8, 1984
against- :	
THE CITY OF NEW YORK, THE MAYOR :	
OF THE CITY OF NEW YORK, THE :	
CITY HUMAN RIGHTS COMMISSION and :	
THE MEMBERS OF THE CITY HUMAN :	
RIGHTS COMMISSION, :	
Defendants. :	
_____ x	

Greenfield, J.:

In this declaratory judgment action in which the court is asked to declare invalid a provision of the local law recently enacted by the City Council of New York dealing with discrimination by private clubs, plaintiff moves for a preliminary injunction pursuant to CPLR 6301 to enjoin the defendant City, the Mayor, and the City Human Rights Commission from enforcing the law pending decision by the court as to a declaration on the constitutionality of the law. Defendants oppose on the grounds of lack of irreparable harm and failure to demonstrate a likelihood of success.

The plaintiff is an incorporated association representing 125 private clubs and associations in the State of New York, a substantial number of which are located in the City of New York. The New York City Council held extended hearings dealing with the problem that some clubs,

avowedly organized for social, cultural, civil or educational purposes, in fact afforded their members opportunities for personal contacts and business deals, which opportunities were denied to persons excluded as members because of sex, race or national origin.

As a result, on October 24, 1984 the City Council enacted Local Law 513-A, amending Title B of the Administrative Code of the City of New York, Sec. Bl-2.0, ch. 1, with the declared intention to "eliminate discrimination in clubs that are not distinctly private". The local law, tracking the language of the state Human Rights Law, had prohibited discrimination in places of public accommodation or amusement, but had granted an express exemption for, among others, "any institution, club or place of accommodation which is in its nature distinctly private." The amendment now requires such a club or institution to prove that it is distinctly private, and further provides that such a club or institution shall not be considered "distinctly private" and exempt from the sweep of the law if it has more than 400 members, provides regular meal service, and receives payment directly or indirectly from non-members for furtherance of trade or business.

The plaintiff in this case has attacked New York City's Local Law 513-A on three grounds: (1) that it unconstitutionally infringes upon the rights of individual members to free association; (2) that the statute is unconstitutionally vague and overbroad, and (3) that it is in conflict with state law.

Both the Federal Government (42 USC Sec. 2000-A[e]) and the State Government (Executive Law Secs. 290 et seq., first enacted L. 1951, c. 800) have acted to eliminate discrimination in places of public accommodation. The laudatory ideal of providing employment, educational and housing opportunities for all without regard to age, race, creed, color, national origin, sex or marital status was declared by the state to be a civil right (Exec. L. Sec.

291). Even though enforcement of the rights of individuals discriminated against might infringe upon claims of individual rights, contract rights and freedom of choice and association, the overriding concept of eliminating invidious discrimination supersedes those lesser rights and has been held to be a valid constitutional exercise of police power. *State Division of Human Rights v. Killian Manufacturing Corp.*, 35 NY2d 201, 211, app. diss. 420 U.S. 915; *Cooney v. Katzen*, 41 Misc 2d 236; *People v. Hvizd*, 70 Misc 2d 654.

"... [T]he principle of the equality of man, regardless of race or color, has become such a compelling force in our American way of life as to render further complacency with respect thereto and mere lip-service treatment thereof seriously detrimental to the public welfare.* * * [C]ontrol over the individual's proprietary interests, to assure their use in such manner as will reflect a recognition of the dignity of man, irrespective of race or color, and his equal right to enjoy and avail himself of the facilities and privileges which such proprietary interest may afford, is well within the purview of the reasonable exercise of the police power of the government, State or particular political subdivision involved, in the public interest. (citing *Jones v. Alfred H. Mayer Co.*, 292 U.S. 409)." *State Commission for Human Rights v. Kennelly*, 30 A.D. 2d 310, 314-315, aff'd. 23 N.Y. 2d 722.

The issue of infringement on the right of freedom of association has already been passed on in other contexts and it is clear that the state's interest in prohibiting invidious discrimination in housing and in places of public accommodation controls. *Tillman v. Wheaton-Havon Recreation Ass'n.*, 410 U.S. 431; *McCrary v. Runyon*, 515 F. 2d 1082, 427 U.S. 160; *NAACP v. Alabama* 357 U.S. 449; *Castle Hill Beach Club v. Arbury*, 2 NY 2d 596; New York

Road Runners Club v. State Division of Human Rights, 81 AD 2d 519, aff'd. 55 NY 2d 122.

The Court of Appeals in *Power Squadrons v. State Human Rights Appeal Board*, 59 NY 2d 401 expressly found:

"While private discrimination may be characterized as a form of freedom of association recognized under the [First] - amendment, 'the constitution places no value on it' and petitioners are not entitled to affirmative protection to further their discriminatory practice. (*Norwood v. Harrison*, 413 U.S. 455, 470) ... though [clubs may be] nominally private, they are not exempt from the provision of the Human Rights Law if they are not, in fact, private except for the purposes of discrimination ..." pp. 414 and 415.

In order to minimize any potential conflict with the right of free association, the statute exempts "distinctly private clubs". (Executive Law, Sec. 292, subd. 9). Significantly, this term is not further defined in the statute, and it is left for implementation by the regulations of the Division of Human Rights, by factual findings on a case by case basis by the Human Rights Appeal Board or by the courts. What is a "distinctly private club" is a question of fact, and the burden of establishing entitlement to exclusion is on the organization claiming to be "distinctly private". *Power Squadrons v. State Human Rights Appeal Board*, supra; *Castle Hill Beach Club v. Arbury*, supra; *McNain v. Drake Business School*, 107 M. 241, 243; *Anderson v. Pass Christian Isles Golf Club*, 488 F.2d 855, 857; *Nesmith v. YMCA of Raleigh*, 397 F.2d 96, 101.

Significantly, however, the State Human Rights Law did not purport to pre-empt the field, leaving counties, cities, villages and towns the right to create their own commission on human relations. (Ch. 376, Laws 1963). Section 300 of the Executive Law provides that Article 15 (The Human Rights Law) is to be construed liberally for the

accomplishment of its purposes. It further provides that as to the discriminatory acts declared unlawful by section 296, the enforcement procedure set forth in the article was to be exclusive "while pending". Thus, the statute creates exclusivity for the state law and procedure only when a proceeding has already commenced before the State Division of Human Rights. *Gaynor v. Rockefeller*, 21 AD2d 92; *aff'd* 15 NY2d 120; *Moran v. Simpson*, 80 Misc 2d 437. In *City of New York v. Claflington Inc.*, 40 Misc 2d 547, this court held that the legislature had not pre-empted the field in enacting its Human Rights Law (Secs. 290-301 of the Exec. Law). Accordingly, when the local law merely supplements the state law and does not prohibit what the state law permits, and does not allow what the state law forbids, the City of New York could properly act in the area of discrimination. (*id.*)

There is no conflict between the state and local law with respect to the private club exemption. The local law merely takes the state law as a starting point, which it may properly do, and without prohibiting what the state law allows, attempts to give meaning and substance to the otherwise undefined term "distinctly private". An amplification which spells out the specifics to give meaning to a general term creates no conflicts unless the redefinition fails to harmonize with the general statutory scheme.

In looking for conflict and dissonance, however, we are not confined only to the statutory words themselves, for if they have been construed by a court, which supplies meaning where the statute is silent, we are bound by the principle that when a judicial interpretation of a statute has been made, that interpretation becomes as much a part of the State Law as if incorporated into the language of the act itself. See *McKinney's Statutes*, Sec. 72-a.

The Power Squadrons case, *supra*, is urged upon us as having set forth the sole criteria for judging whether a club is "distinctly private". If the Court of Appeals has

supplied us with a definition of the state law which is in conflict with the local law, then the local law would have to give way. I do not find such a conflict to exist.

In the Power Squadrons case, the Court of Appeals declared that "the essence of a private club is selectivity in its membership. It must have a 'plan or purpose of exclusiveness'", *supra* p.412. It then set forth five criteria to focus on to determine whether a club or association comes within the "distinctly private" exemption. It did not however find these to be the sole and exclusive standards, for it declared the question of what is "distinctly private" to be a question of fact, as to which the party claiming exemption had the burden of proof, and that the criteria given were factors which "the fact finder may consider". These included:

1. Whether the club has permanent machinery established to carefully screen applicants;
2. The limitation of the use of the facilities and services of the organization to members and bona fide guests;
3. The club is controlled by the membership;
4. The club is non-profit and operates solely for the benefit and pleasure of the members; and
5. It directs its publicity only to members for their information and guidance.

Applying these criteria, the Court of Appeals found that the Power Squadrons, while they might be controlled by their membership, were tinged with a public purpose and being open to all applicants for membership except females, did not come within the statutory exclusion.

In defining what is "distinctly private", the new city legislation sets forth a three pronged test and declares that an institution, club or place of public accommodation shall not be distinctly private if it has:

- (1) more than 400 members;
- (2) provides regular meal service, and
- (3) regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of non-members for the furtherance of trade or business.

Religious and benevolent corporations and associations are exempted. There is nothing in this law which is inconsistent with State Law or is so vague as to be incapable of fair enforcement. Nor is there any merit to the contention that the statute is overbroad.

There is further contention that the statute is impermissibly vague in failing to set forth the qualifications which determine whether a club has 400 members, what it means to "provide regular meal service", and how one determines whether a club "regularly receives payment directly or indirectly from non-members". It is also contended that the term "furtherance of trade or business" is bizarre and imprecise. The Executive Director of the Human Rights Commission indicates that she will promulgate rules and regulations to effectuate Local Law 513-A and to define the terms used in such law. She further agrees not to initiate any complaints of unlawful discriminatory practice until such time as the rules and regulations become effective. Even without further administrative honing of the statutory terms, it does not appear that the local enactment must fail for vagueness. It is less vague any then the state statute, which merely marked out a broad exemption for "distinctly private clubs", and nevertheless passed constitutional muster. The statute sets forth the general guide lines, which even in their generality are terms of sufficient precision so that a common sense application on an ad hoc case by case basis could proceed.

The stated objective of Local Law 513-A is to open up clubs and organizations where business deals are made to women and minorities. It is not readily apparent that the

means adopted in the local law will achieve that objective. Clubs and associations, even if they have more than 400 members and provide regular meal services (at which the members can convivially discuss business deals) are still exempt from the reach of the law so long as they do not receive payment from non-members for the furtherance of trade or business. Each member must pay for his or her own dues. Understandably, clubs pressed for adequate funding might wish to rent out their facilities. They can continue to do so, even to non-members, so long as those events are private and social, i.e., weddings, bar-mitzvahs, receptions and cocktail parties. It is only when a club receives money from non-members to further trade or business (as in the case of a cocktail reception by a corporation to launch a new project) that it comes within the ambit of the statute. It is not clear that inhibiting such business functions will accomplish the purpose of opening the club's lounges and dining rooms to those presently excluded, so that they too could enjoy participating in the alleged opportunities for business deals and contacts. It is not the function of the court, however, to measure the effectiveness of a statute in achieving its declared ends, or to review its wisdom or its foolishness. Public policy is declared by our legislative bodies, and courts will interfere only where there is a clear contravention of constitutional mandates.

Plaintiff claims irreparable injury if the statute is permitted to go into effect. The agency charged with enforcement however, states that it is going to withhold bringing proceedings against anybody until its regulations are promulgated. There is no convincing showing that great expenditures will have to be made in the interim to convert facilities for the equal use of both sexes. Neither will any of the constituent clubs have to fear that until final resolution they will be cast in the role of lawbreakers.

This court finds, therefore, that plaintiff association, in applying for a temporary injunction, has failed to dem-

onstrate a likelihood of success on the merits or that irreparable injury will flow in the absence of the injunction. The answer in this declaratory judgment action has not yet been filed. The response of the Corporation Counsel in opposition to the motion for an injunction has been quite perfunctory. Nevertheless, the prerequisites for the granting of an injunction have not been met. In so concluding, this court is not unmindful of the direction in *Tucker v. Toia*, 54 AD 2d 322, 326, that where there are weighty issues of constitutional law, a preliminary injunction should ordinarily be granted to maintain the status quo while the issues are determined in a deliberate and judicious manner. In this case the plaintiff's argument as to the unconstitutionality of the statute is not that "weighty", and there appears to be ample reason to expect that the status quo will be maintained while the City Human Rights Commission promulgates its new rules. Thus the action for declaratory judgment can be joined and the issues fully explored. At this stage, the motion for preliminary injunction is denied.

Dated: November 30, 1984

J.S.C.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 7, 1985

Present-Hon. Theodore R. Kupferman, Justice Presiding
David Ross
John Carro
Max Bloom, Justices.

NEW YORK STATE CLUB ASSOCIATION, INC.,	:	
	:	
<i>Plaintiff-Appellant,</i>	:	
	:	22543N
-against-	:	
	:	
THE CITY OF NEW YORK, THE MAYOR OF	:	
THE CITY OF NEW YORK, THE CITY HUMAN RIGHTS	:	
COMMISSION and THE MEMBERS OF THE CITY	:	
HUMAN RIGHTS COMMISSION,	:	
	:	
<i>Defendants-Respondents.</i>	:	

An appeal having been taken to this Court by the plaintiff-appellant from an order of the Supreme Court, New York County (Edward Greenfield, J.), entered on December 7, 1984, which denied plaintiff-appellant's motion for a preliminary injunction, and said appeal having been argued by Angelo T. Cometa of counsel for the appellant, and by Patricia A. O'Malley of counsel for the respondents; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed, without costs and without disbursements. The grant of a preliminary injunction would be premature inasmuch as rules have not been promulgated by the City Human Rights Commission.

ENTER:

EDWARD J. REYNOLDS
Clerk.

[Exhibit E to Affirmation in Support of Cross-Motion for Summary Judgment and in Opposition to Motion for Summary Judgment (Verified Answer) has been omitted here because reproduced in this appendix in its chronological place in the proceedings at pages JA 21-26, *supra*.]

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

	x	
NEW YORK STATE CLUB ASSOCIATION, :	:	
INC., :	:	
<i>Plaintiff,</i>	:	SUPPLEMENTAL
	:	AFFIRMATION
-against-	:	
	:	Index No. 25025/84
THE CITY OF NEW YORK, THE MAYOR :	:	
OF THE CITY OF NEW YORK, THE :	:	
CITY HUMAN RIGHTS COMMISSION and :	:	
THE MEMBERS OF THE CITY HUMAN :	:	
RIGHTS COMMISSION, :	:	
<i>Defendants.</i>	:	
	x	

PATRICIA A. O'MALLEY, an attorney admitted to practice before the Courts of the State of New York, affirms under penalty of perjury, as follows:

1. I am an Assistant Corporation Counsel in the office of FREDERICK A. O. SCHWARZ, JR., Corporation Counsel of the City of New York, attorney for defendants. This supplemental affirmation is submitted in further support of defendants' cross-motion for summary judgment pursuant to CPLR 3212 dismissing the complaint in its entirety and in opposition to plaintiff's motion for summary judgment.

2. This action was commenced in October, 1984. Plaintiff seeks a declaration that Local Law 513-A,* an amendment

* The law which plaintiff challenges was designated, in bill form, as "Introductory 513-A". After it was signed into law by the Mayor of the City of New York, it became Local Law No. 63. The law will be referred to here as Local Law 513-A.

to the Administrative Code of the City of New York enacted into law on October 24, 1984, is unconstitutional on both state and federal grounds. Both parties have moved for summary judgment.

3. Plaintiff contends, *inter alia*, that the local law is unconstitutionally vague. Specifically, plaintiff has argued that terms used in the law (e.g., "members", "regular meal service", "furtherance of a trade or business") are imprecise and unclear.

4. In response to plaintiff's motion for a preliminary injunction, defendants stated that regulations were to be promulgated by the New York City Commission on Human Rights ("Commission") to accompany the local law and that it was contemplated that the regulations would include definitions of particular terms complained about by plaintiff (see affidavit of Alberta Fuentes, sworn to November 7, 1984).

5. Recently (after a public comment period on proposed regulations), the Commission promulgated regulations that pertain to the local law. A copy of the regulations is annexed hereto as Exhibit "A". The regulations will take effect on August 1, 1985. See Exhibit "A".

6. The regulations contain definitions to be used by the Commission in determining whether an organization is "distinctly private" under the New York City Human Rights Law as amended by the local law. The definitions encompass all of the terms used in the local law that plaintiff has complained are vague.

Dated: New York, New York
July 2, 1985

PATRICIA A. O'MALLEY

NEW YORK CITY COMMISSION ON HUMAN RIGHTS

PROMULGATION OF REGULATIONS RELATING TO UNLAWFUL DISCRIMINATORY PRACTICES IN INSTITUTIONS, CLUBS OR PLACES OF ACCOMMODATION WHICH ARE NOT DISTINCTLY PRIVATE

IN COMPLIANCE WITH SECTION 1105 OF THE NEW YORK CITY CHARTER and exercising the authority vested in me as Chairperson of the City Commission on Human Rights by Section B1-3.0 of Chapter I, Title B of the Administrative Code of the City of New York, regulations relating to unlawful discriminatory practices in institutions, clubs or places of accommodation which are not distinctly private are hereby promulgated.

EXPLANATION: Sections B1-7.0, subdivision 2 and B1-7.1 of the New York City Human Rights Law provide that it shall be an unlawful discriminatory practice for any place of public accommodation, resort or amusement to refuse, withhold from or deny to any person because of race, creed, color, national origin, or sex, or the fact that the person is an otherwise qualified person who is physically or mentally handicapped, "the accommodations, advantages, facilities, or privileges thereof." Section B1-2.0(9) provides that the term "place of public accommodation, resort or amusement" shall not include any institution, club or place of accommodation which is "in its nature distinctly private." Section 2.0(9) was amended by Local Law No. 63 of 1984 to provide that:

"An institution, club or place of accommodation shall not be considered in its nature distinctly private if it has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space,

facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business."

These regulations pertain to this new provision.

REGULATIONS

UNLAWFUL DISCRIMINATORY PRACTICES IN INSTITUTIONS, CLUBS OR PLACES OF ACCOMMODATION WHICH ARE NOT DISTINCTLY PRIVATE

1. Definitions. The definitions in this section shall be used by the New York City Commission on Human Rights in determining whether an institution, club, or place of accommodation is "distinctly private" as that term is used in the New York City Human Rights Law, Administrative Code Section B1-1.0 *et seq.*

- a. "Payment directly from a nonmember" shall mean payment made to an institution, club or place of accommodation by a nonmember for expenses incurred by a member or nonmember for dues, fees, use of space, facilities, services, meals or beverages.
- b. "Payment indirectly from a nonmember" shall mean payment made to a member or nonmember by another nonmember as reimbursement for payment made to an institution, club or place of accommodation for expenses incurred for dues, fees, use of space, facilities, meals or beverages.
- c. "Payment on behalf of a nonmember" shall mean payment by a member or nonmember for expenses incurred for dues, fees, use of space, facilities, services, meals or beverages by or for a nonmember.
- d. Payment "for the furtherance of trade or business" shall mean payment made by or on behalf of a trade

or business organization, payment made by an individual from an account which the individual uses primarily for trade or business purposes, payment made by an individual who is reimbursed for the payment by the individual's employer or by a trade or business organization, or other payment made in connection with an individual's trade or business, including entertaining clients or business associates, holding meetings or other business-related events.

- e. "Members" shall mean individuals belonging to any class of membership offered by the institution, club, or place of accommodation including, but not limited to, full membership, resident membership, nonresident membership, temporary membership, family membership, honorary membership, associate membership, membership limited to use of dining or athletic facilities, and membership of members' minor children or spouses.
- f. "Regular meal service" shall mean the provision, either directly or under a contract with another person, of breakfast, lunch, or dinner on three or more days per week during two or more weeks per month during six or more months per year.
- g. "Regularly receives payment". An institution, club or place of accommodation "regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business" if it receives as many such payments during the course of a year as the number of weeks any part of which the institution, club or place of accommodation is available for use by members or non-members per year.

2. Severability. If any provision of these regulations or the application thereof is held invalid, the remainder of these regulations shall not be affected by such holding and shall remain in full force and effect.

3. Effective date. These regulations shall take effect on August 1, 1985.

Dated: June 21, 1985

MARCELLA MAXWELL,
Chairperson

Filed with the City Clerk 6/21/85.
Printed in the City Record 6/28/85.

APPELLANT'S BRIEF

①
No. 86-1836

Supreme Court, U.S.

FILED

NOV 19 1987

JOSEPH P. SPANGLER, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

NEW YORK STATE CLUB ASSOCIATION, INC.,
Appellant,
vs.

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF
NEW YORK, THE CITY HUMAN RIGHTS COMMISSION AND
THE MEMBERS OF THE CITY HUMAN RIGHTS COMMISSION,
Appellees.

On Appeal from the Court of Appeals
Of the State of New York

BRIEF FOR THE APPELLANT

ALAN MANSFIELD
Counsel of Record

ANGELO T. COMETA
LOUIS J. LEFKOWITZ
DEBRA A. ROTH
PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
40 West 57th Street
New York, New York 10019
(212) 977-9700

Attorneys for Appellant

November 19, 1987

QUESTIONS PRESENTED

This appeal presents the following questions under the United States Constitution:

1. Whether Local Law 63 violates constitutional rights of freedom of association, speech and privacy because it (a) creates an irrebuttable presumption that any club which has 400 members, regularly serves meals and regularly receives income from or on behalf of nonmembers in furtherance of trade or business is not a private club, notwithstanding the fact that its size, purpose, selectivity and exclusion of others from critical aspects of the relationship entitles it to constitutional protection, and (b) is impermissibly overbroad and therefore chills the associational, privacy and speech rights of private clubs formed for primarily political, religious, or other expressive purposes?

2. Whether Local Law 63 violates the equal protection clause because it applies to private clubs with selective memberships, yet excludes similarly-situated benevolent organizations and religious corporations?

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IN THE
Supreme Court of the United States
 OCTOBER TERM, 1987

No. 86-1836

NEW YORK STATE CLUB ASSOCIATION, INC.,
Appellant,

v.

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF
 NEW YORK, THE CITY HUMAN RIGHTS COMMISSION AND
 THE MEMBERS OF THE CITY HUMAN RIGHTS COMMISSION,
Appellees.

On Appeal From the Court of Appeals
 Of the State of New York

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The unreported opinion of the Supreme Court of the State of New York, New York County, was rendered on October 28, 1985 and is printed in the Appendix to the Jurisdictional Statement at pages 25a-40a. The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department, was rendered on July 31, 1986, is reported at 118 A.D.2d 392, 505 N.Y.S.2d 152 (1st Dep't 1986) and is printed in the Appendix to the Jurisdictional Statement at pages 16a-22a. The opinion of

the Court of Appeals of the State of New York was rendered on February 17, 1987, is reported at 69 N.Y.2d 211, 505 N.E.2d 915, 513 N.Y.S.2d 349 (1987) and is printed in the Appendix to the Jurisdictional Statement at pages 2a-13a.

JURISDICTIONAL GROUNDS

This appeal is taken from the February 17, 1987 opinion and order of the Court of Appeals of the State of New York, which affirmed a final judgment of the Supreme Court of the State of New York. Appellant's Notice of Appeal was filed in the Court of Appeals of the State of New York on May 11, 1987 and the Court noted probable jurisdiction on October 5, 1987. The jurisdiction of the Court is predicated on 28 U.S.C. § 1257(2) (1982).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This appeal involves the first and fourteenth amendments to the United States Constitution, the Administrative Code of the City of New York ("Admin. Code"), Title 8 §§ 8-101 *et seq.* (1986) and the New York City Commission on Human Rights, Regulations: Unlawful Discriminatory Practices in Institutions, Clubs or Places of Public Accommodation Which Are Not Distinctly Private ("Regulations"), ¶ 1 *et seq.* (effective Aug. 1, 1985).

The first amendment provides, in pertinent part, that:

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The fourteenth amendment provides, in pertinent part, that:

[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York City Local Law 63 amended New York City's public accommodations law, to provide, in pertinent part, that:

[t]he term "place of public accommodation, resort or amusement" shall include . . . all places included in the meaning of such terms as: inns, taverns, road houses, hotels, motels Such term shall not include . . . any institution, club or place of accommodation which proves that it is in its nature distinctly private. An institution, club or place of accommodation shall not be considered in its nature distinctly private if it has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of non-members for the furtherance of trade or business. For the purposes of this section a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or the religious corporations law shall be deemed to be in its nature distinctly private.

Admin. Code, Title 8 § 8-102(9) (Local Law 63 in italics).¹

¹ Other pertinent sections of the public accommodations law appear in the Appendix to this Brief. The public accommodations law prohibits

Regulations promulgated under Local Law 63 are printed in the Joint Appendix ("JA") at 69-72.

STATEMENT

A. The Parties

Appellant New York State Club Association, Inc.¹ ("NYSCA") is an association of 125 private clubs and associations in the State of New York, a substantial number of which are located in the City of New York. JA 32. NYSCA's principal purpose is to promote its members' common interests by providing a structured forum for communication and to disseminate information by and among its membership. JA 32-33, 38. NYSCA has also undertaken to protect the constitutional rights of its members in political and legislative spheres. JA 33.

According to Gale's Encyclopedia of Associations (14th ed. 1980), more than 600,000 people in New York State are members of formal organizations which limit their membership on grounds of, *inter alia*, race, religion, sex or national origin. JA 36. Among NYSCA's members are clubs which are exclusively male, exclusively female and exclusively one religion, nationality or cultural heritage. NYSCA also includes private clubs that, as a matter of choice, practice no discrimination whatsoever. Some of NYSCA's clubs have been organized to provide a comfortable and congenial atmosphere to engage in political, academic, social and/or recreational interchange with one another. Jurisdictional Statement Appendix ("JS") 12a; JA 32. In addition, the facilities, services and, in some circumstances, dining rooms of these clubs are available solely to club members and *bona fide* guests, the clubs are op-

discrimination based on race, creed, color, national origin, physical or mental handicap and actual or perceived sexual orientation. Title 8 §§ 8-107, 108 and 108.1.

¹ Appellant New York State Club Association, Inc. has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

erated on a nonprofit basis for the pleasure of their membership and their publicity and activities are not directed at the public at large. JA 32.

Appellees are the City of New York, the Mayor of the City of New York, the City Human Rights Commission, which is the enforcement agency for New York City's public accommodations law, and the members of the City Human Rights Commission (collectively, "the City").

B. Local Law 63

Until the enactment of Local Law 63, New York State and New York City provided for governmental regulation and enforcement of anti-discrimination provisions through virtually identical public accommodations laws. Both public accommodations laws exempted "distinctly private" organizations. As construed by the Court of Appeals of the State of New York, the term "distinctly private" applies to clubs which have a permanent machinery carefully to screen applicants on a subjective basis, limit the use of their facilities and services to members and *bona fide* guests of members, are controlled by the membership, are nonprofit and operate solely for the benefit and pleasure of the members and direct their publicity exclusively to members for their information and guidance. *United States Power Squadrons v. State Human Rights Appeal Board*, 59 N.Y.2d 401, 412-13, 452 N.E.2d 1199, 1204-05, 465 N.Y.S.2d 871, 876 (1983).

On October 24, 1984, the Mayor signed Local Law 63 into law. The amendment radically altered the definition of a "distinctly private" organization, thereby exposing previously exempt, private associations located in the City of New York to the full panoply of the anti-discrimination and enforcement provisions of Title 8. Under Local Law 63, a club or association automatically loses its right to show that it is "distinctly private" if it:

- (a) has more than 400 members;

(b) provides regular meal service; and

(c) regularly receives payment [regardless of amount or frequency] for dues, fees, use of space, facilities, services, meals or beverages, directly or indirectly from or on behalf of a nonmember for furtherance of trade or business.

The amendment, however, expressly exempts corporations incorporated pursuant to or described in the benevolent orders law and religious corporations incorporated under either the religious corporations law or the education law. JA 17.

Approximately nine months after Local Law 63's enactment, the City promulgated Regulations ostensibly aimed at defining certain terms contained in Local Law 63 which NYSCA had challenged on vagueness grounds.³ The Regulations seek to define such terms as "member," "regularly receives payment" and "for furtherance of trade or business." For example, "regularly receives payment" is defined as "[receipt of] as many . . . payments during the course of a year as the number of weeks any part of which the institution, club or place of accommodation is available for use by members or non-members per year." Regulations §1(g), JA 71.

Local Law 63 established the irrebuttable presumption that a club which meets the tripartite test is prohibited from proving that it is covered by the "distinctly private" exclusion to the definition of a "place of public accommodation" and therefore protected from governmental regulation of its membership policies and operations. Nothing in Local Law 63 requires a private club, before it is ir-

³ NYSCA challenged Local Law 63 on vagueness grounds, among others, in its complaint and its motion for preliminary injunction filed the day after Local Law 63 was signed. The motion was denied, *inter alia*, on the ground that the City attested that it would not enforce Local Law 63 until regulations were drawn. JA 46 n.*, 62-64.

rebuttably deemed not to be distinctly private, to have a substantial impact on trade or commerce; nor does the amendment require that a substantial portion of the club's income derive from direct or indirect payment by non-members for furtherance of trade or business.⁴ Local Law 63 precludes a club from demonstrating that, as a result of its size, purpose, selectivity and the exclusion of others from critical aspects of the relationship, it is entitled to constitutional protection under the analysis set forth by the Court in *Board of Directors of Rotary International v. Rotary Club of Duarte*, ___ U.S. ___, 107 S. Ct. 1940 (1987) ("*Rotary*")⁵ and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) ("*Roberts*").

C. The Proceedings

Immediately after its enactment, NYSCA brought this action to declare Local Law 63 unconstitutional and to enjoin its enforcement. NYSCA challenged Local Law 63 as violating its constituent club members' constitutional rights of freedom of association, privacy and speech guaranteed by the first and fourteenth amendments to the federal Constitution, as well as violating the equal protection clause of the fourteenth amendment. NYSCA also challenged Local Law 63 because it is impermissibly overbroad. JA 11-12.

After cross-motions for summary judgment, the trial court declared Local Law 63 to be constitutional. JS 40a. By an opinion and order dated July 31, 1986, a majority

⁴ A payment "for furtherance of trade or business" is defined in the Regulations as payment on behalf of a trade or business organization, payment made from an account used primarily for business purposes or other payment made in connection with an individual's trade or business, including entertaining friends who may be business associates or clients. Regulations §1(d), JA 70-71.

⁵ The Court of Appeals' decision was rendered before *Rotary* was decided. Accordingly, the State courts which considered NYSCA's claims did not have the benefit of its analysis.

panel of the Appellate Division of the Supreme Court, First Department, relying on the trial court's decision, affirmed. JS 15a, 22a. In a dissenting opinion, one justice concluded that Local Law 63 violated NYSCA's members' rights to equal protection of the laws because the local law exempted similarly-situated benevolent orders and religious corporations from its reach. JS 20a.

On February 17, 1987, the Court of Appeals affirmed the opinion and order of the Appellate Division, holding that Local Law 63 did not abridge NYSCA's members' constitutional rights of freedom of association, privacy and speech and rejecting summarily NYSCA's equal protection argument. JS 1a, 13a.

SUMMARY OF ARGUMENT

For more than a century, private clubs have played a critical role in the fabric of American society. Social commentators and historians as early as de Tocqueville have observed that private clubs contribute to the principles of diversity and pluralism which underlie our culture. Private clubs at once foster a citizen's search for self-identification and provide a forum for interpersonal relationships and the expression of ideas, be they political, cultural or social. It is therefore not surprising that more than 600,000 New Yorkers and millions of Americans by virtue of their membership in private organizations have contributed to America's being called a society of "joiners." In *Roberts* and *Rotary*, the Court, without dissent, recognized the value of private clubs and observed that their membership's freedoms of private and expressive association are guaranteed by the first and fourteenth amendments to the Constitution.

Years ago, federal, state and local jurisdictions enacted public accommodations laws for the commendable purpose of eliminating invidious discrimination in places like restaurants and theatres which offered their goods and ser-

vices to the public. Until the passage of Local Law 63, legislatures had balanced the interests of those who had historically been deprived of equal access to public accommodations with the competing interests of those against whom the anti-discrimination provisions would be enforced. As a result, many jurisdictions, including the City of New York, exempted private clubs from the definition of "place of public accommodation." While the government could appropriately articulate its interest in preventing discrimination in places which were truly public, no corresponding governmental interest existed which was sufficient to defeat the freedoms of association, privacy and speech as practiced in private clubs.

In a direct assault on this constitutionally-mandated balance, Local Law 63 radically altered the definition of "place of public accommodation" in a manner which precludes private clubs from establishing their entitlement to constitutional protection. Local Law 63 irrebuttably presumes that any club which has over 400 members, regularly serves meals and regularly receives revenue (regardless of whether frequent or substantial) directly or indirectly for or on behalf of nonmembers for purposes of trade or business is automatically not distinctly private and therefore can be regulated as a public accommodation. Local Law 63's mechanical three-pronged test stands in marked contrast to the fluid examination endorsed by the Court in *Roberts* and *Rotary*. In *Rotary*, the Court ruled that: "In determining whether a particular association is sufficiently personal or private to warrant constitutional protection, we consider factors such as size, purpose, selectivity and whether others are excluded from critical aspects of the relationship." 107 S. Ct. at 1946. Whereas the Court holds that a club should be able to identify all relevant facts and circumstances which would demonstrate its private character, Local Law 63 arbitrarily obstructs such an inquiry and precludes a club from showing, *inter alia*, what federal courts have designated as the hallmark of a private

club: its "plan or purpose of exclusiveness." Nothing in Local Law 63 permits a club to demonstrate that its being forced to admit a member whom the club does not want will irrevocably compromise the nature of the club's private and expressive association.

The City of New York's commitment to the eradication of discrimination is irrelevant to the fact that Local Law 63 is unconstitutional as drafted because, in violation of the teaching of *Roberts* and *Rotary*, it fails to allow clubs to establish their entitlement to protection under the first and fourteenth amendments. By employing its crazy-quilt three-pronged irrebuttable presumption, the City of New York has confused the public versus private distinction and thereby offended the constitutionally-compelled balance between lawful public accommodation regulations and the freedoms of association, privacy and speech. In this regard, Local Law 63 is also impermissibly overbroad because, *inter alia*, it provides no mechanism to protect the most cherished of constitutional values, viz., political speech. To require a political organization, especially one espousing unpopular ethnic, racial or gender related views, to admit someone with opposing views or whose presence in itself would be inimical to the organization's stand contravenes settled first amendment jurisprudence.

Local Law 63 is also violative of the equal protection clause of the fourteenth amendment because it exempts similarly-situated benevolent orders and religious corporations from its ambit. Where, as here, fundamental constitutional rights are at stake, equal protection analysis requires the government to show that its classification system is necessary to accomplish a compelling state interest and has been precisely tailored to serve that interest. There was no testimony before the City Council which indicated that the very conduct Local Law 63 was designed to prevent did not occur at benevolent orders and religious corporations. Rather, all the testimony before the legislature was to the opposite effect: no distinction between the cov-

ered and exempt groups should be made. Indeed, if the exempt groups did not meet the three prongs, they would be entitled to the "distinctly private" exclusion on their own accord. Accordingly, the exemption could only have been the result of the legislature's implicit understanding that benevolent orders and religious corporations are no different from private social organizations. Especially where first amendment rights are implicated, to distinguish between similarly-situated organizations without evidence that the conduct sought to be regulated occurs in one but not the other is patently irrational and must fail under any level of equal protection scrutiny.

It is no answer to suggest that the exemption was appropriate as a matter of political expediency. As Justice Jackson observed in *Railway Express Agency v. City of New York*: "nothing opens the door to arbitrary actions so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." 336 U.S. 106, 112-113 (1949).

Accordingly, Local Law 63 should be declared unconstitutional and void.

ARGUMENT

I. LOCAL LAW 63 VIOLATES NYSCA'S MEMBERS' RIGHTS OF FREEDOM OF ASSOCIATION, PRIVACY AND SPEECH BECAUSE IT CREATES AN IRREBUTTABLE PRESUMPTION THAT HIGHLY SELECTIVE MEMBERSHIP ORGANIZATIONS WHICH MEET ITS THREE-PRONGED TEST ARE NOT ENTITLED TO CONSTITUTIONAL PROTECTION.

Federal, New York State and City of New York legislatures long ago enacted civil rights laws for the laudable purpose of combatting discrimination in places of public

accommodation. Pursuant to these laws, discriminatory practices in places of public accommodation such as hotels, bars, restaurants, movie theatres and the like (all of which are open to the public and most of which are operated for profit) are prohibited. See, e.g., Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a *et seq.* (1982); Human Rights Law, N.Y. Exec. Law §§ 290 *et seq.* (McKinney 1982); City Commission on Human Rights, Admin. Code, Title 8 §§ 8-101 *et seq.* All three statutory schemes, however, expressly exclude private organizations from the definition of "place of public accommodation."⁶ See, e.g., 42 U.S.C. § 2000a(e) (1982); N.Y. Exec. Law § 292 (McKinney 1982) ("distinctly private" organizations exempted); N.Y. Civ. Rights Law § 40 (McKinney 1976) (same); Admin. Code, Title 8 § 8-102(9) (same).

Private organizations are excluded from these public accommodations laws because legislatures have been sensitive to their members' rights of association, privacy and speech which protect them from government regulation of their organization's practices.⁷ See generally *Rotary*, 107

⁶ Public accommodations laws have been enacted in at least 38 states and the District of Columbia; 21 states and the District of Columbia specifically exempt private clubs. Note, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. Rev. L. & Soc. Change 215, 290-91 (1978).

⁷ The intention behind the private club exemption in the federal public accommodations law is reflected in Senator Hubert H. Humphrey's floor remarks in the Senate debate:

Take for example, the Cosmos Club, the Army and Navy Club, the University Club, the Union League Club, the Minneapolis Club, or the Minneapolis Athletic Club, to one of which I am privileged to belong. Those are private clubs I wish to make it clear that I do not believe there should be a Federal law which provides that a private club should be managed this way, or managed that way.

110 Cong. Rec. 5822 (1964). See also Remarks of Senator Warren G. Magnuson, 110 Cong. Rec. 7404 (1964) ("Local fraternal organizations,

S. Ct. at 1940; *Roberts*, 468 U.S. at 609. The Court has held that government's interest in assuring equal access to public accommodations will defeat the freedom of association only where publicly available opportunities are at issue. See, e.g., *Hishon v. King & Spalding*, 467 U.S. 69 (1984) (employment); *Runyon v. McCrary*, 427 U.S. 160 (1968) (education); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1963) (lodging). In the realm of private affairs, the freedom of association prevails: "[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees." *Roberts*, 468 U.S. at 620 (citations omitted). See generally Note, *Developments—Private Associations*, 76 Harv. L. Rev. 983, 991 (1963) (observing that state interest diminishes as indicia of private relationships increase).⁸ Local Law 63 is at odds with these fundamental precepts because it seeks to regulate conduct which occurs in a totally private sphere.

The prohibition against government regulation of private associations is an acknowledgment of their importance in American life. Private associations serve many functions. Formed out of common interests and inclinations, they

private country clubs, and the like are outside the reach of Title II by reason of the bona fide private club exception."); Remarks of Senator Long, 110 Cong. Rec. 13697 (1964) (purpose of private club exemption is to "make it clear that the test of whether a private club, or an establishment not open to the public, is exempt from Title II, relates to whether it is, in fact, a private club, or whether it is, in fact, an establishment not open to the public. It does not relate to whatever purpose or animus the organizers may have had in mind when they originally brought the organization or establishment into existence.").

⁸ In this connection, the Court of Appeals erred in holding that there exists a compelling governmental interest in redesignating as not distinctly private those private clubs which largely comprise NYSCA's membership. JS 12a. The State's only defensible compelling interest is in assuring equal access to publicly available goods and services. No principled interest is furthered in interfering in private associations.

permit people to pool their resources and talents to achieve collectively what they cannot achieve singly. They provide outlets for creativity and, by enabling persons to seek out and enjoy like-minded individuals, they relieve a sense of isolation:

Such groups are formed when individuals, having become aware of a common interest, mutually assist one another over a period of time to promote that interest. They organize and distribute tasks so as to achieve a common end which otherwise would be less easily attainable. The ability to organize and participate in collective action thus increases the range of alternatives from which an individual may choose his social, intellectual, religious, economic and political activities. In addition, voluntary associations relieve the feeling of isolation which tends to plague modern society. They provide opportunity for creativity and responsibility. Because of their presence a person is not forced to choose between conformity with the majority and complete isolation: he has numerous choices and can indulge his idiosyncrasies with others of similar inclination.

Note, *Developments—Private Associations*, 76 Harv. L. Rev. at 987-88.

The Court has acknowledged that among the values which private associations foster are diversity and pluralism. *Roberts*, 468 U.S. at 618-19. Individuals also obtain emotional enrichment from their ties with others and, in this way, define their sense of identity.⁹ 468 U.S. at 619.

⁹ Professor Karst elaborates upon this idea when he writes that "[i]t is an individual's intimate associations [which is defined to include friendship] that give him his best chance to be seen (and thus to see himself) as a whole person rather than as an aggregate of social roles." Karst, *The Freedom of Intimate Association*, 89 Yale L. J. 624, 635-36 (1980).

Moreover, by combining with others, individuals may exercise more fully the freedom to speak, to worship and to petition, all of which the first amendment protects, thereby assuring political diversity. 468 U.S. at 622.

The ability to choose one's associates is an aspect of individual liberty which the Constitution was designed to secure. *Roberts*, 468 U.S. at 618. Indeed,

[t]he ability to choose associates, to determine those with whom to share private information and social activities, is an aspect of personal liberty warranting some constitutional recognition. By according individuals the right to structure their social relationships free from state intrusion, the law can create spheres of solidarity that promote both private and public values. Such associations preserve opportunities for self-expression and mutual commitment, as well as constraints on governmental power.

Rhode, *Association and Assimilation*, 81 Nw. U. L. Rev. 106, 118 (1987).

A century ago, Alexis de Tocqueville succinctly described the fundamental importance of the right of association and the danger of governmental interference with that right:

The most natural privilege of man next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and acting in common with them. The right of association therefore appears to be as almost inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.

A. de Tocqueville, *Democracy in America*, at 196 (Bradley ed. 1954). See also Craven, *Personhood: The Right To Be Let Alone*, 1976 Duke L.J. 699 ("The right to be let alone

is the only nonpolitical protection for that vast array of human activities which, considered separately, may seem trivial, but together make up what most individuals think of as freedom." (Footnote omitted.); Douglas, *The Right of Association*, 63 Col. L. Rev. 1361, 1367 (1963) ("Whether an individual seeks to be let alone with his thoughts or in the sanctuary of his home, or seeks to associate with others for the attainment of lawful purposes, his interest in being free from governmental interference is the same.").

The Court has consistently underscored the value of freedom of association in our constitutional system of government. Writing for a unanimous Court in *NAACP v. Alabama*, Justice Harlan spoke specifically about how freedom of association fosters the advancement of beliefs and ideas and stated that efforts to curtail this freedom must be carefully scrutinized:

It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

357 U.S. 449, 460-61 (1958) (citations omitted). This right is secured against either federal or state encroachment. *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968); *NAACP v. Button*, 371 U.S. 415 (1963).

Justice Douglas also spoke of the right of association in *Griswold v. Connecticut* as the right to express one's opinion by affiliation with a group:

The right of "association," like the right of belief . . . is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

381 U.S. 479, 483 (1965) (citations omitted). See also *Healy v. James*, 408 U.S. 169, 181 (1972).

In *Moose Lodge No. 107 v. Irvis*, Justices Douglas and Marshall reasoned that the right of association created a "zone of privacy" which protected one's choice of one's associates in a private club:

My view of the First Amendment and the related guarantees of the Bill of Rights is that they create a zone of privacy which precludes government from interfering with private clubs or groups. The associational rights which our system honors permit all white, all black, all brown and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires. So the fact that the Moose Lodge allows only Caucasians to join or come as guests is constitutionally irrelevant, as is the decision of the Black Muslims to admit to their services only members of their race.

407 U.S. 163, 179-30 (1972) (dissenting on other grounds) (emphasis added), quoted in *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974); cf. *Bell v. Maryland*, 378 U.S.

226, 313 (1964) (Goldberg, J., concurring); *see also* *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (requiring money contributions to those who assert repellant beliefs infringes on associational rights as much as prohibiting contributions to those advocating attractive beliefs).

The Court in *Rotary* and *Roberts* has recognized that freedom of association embraces both private and expressive components, and that one's decision to associate with another is protected under either:

First, the Court has held that the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships. Second, the Court has upheld the freedom of individuals to associate for the purpose of engaging in protected speech or religious activities.

Rotary, 107 S. Ct. at 1945. *See also* *Roberts*, 468 U.S. at 617-18. Local Law 63 is unconstitutional because it abridges both aspects of the freedom of association.

A. Local Law 63 Violates NYSCA's Members' Rights of Private Association.

In *Rotary*, the Court "recognized that the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights." 107 S. Ct. at 1945. The Court specifically stated that this right was not restricted to relationships among family members but extended to all relationships which "presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.'" 107 S. Ct. 1946, *quoting* *Roberts*, 468 U.S. at 619-20.

In seeking to define the class of relationships whose rights are protected because they are "private," the Court

also affirmed the principle that "[d]etermining the limits of state authority over an individual's freedom to enter into a particular association . . . unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." 107 S. Ct. at 1946, *quoting* *Roberts*, 468 U.S. at 620. "In determining whether a particular association is sufficiently personal or private to warrant constitutional protection, we consider factors such as size, purpose, selectivity and whether others are excluded from critical aspects of the relationship." 107 S. Ct. at 1946.

Under this constitutionally-compelled analysis, in *Roberts* and *Rotary*, the Court found both Jaycees and Rotary Clubs to be outside the category of relationships worthy of constitutional protection. In *Rotary*, the Court noted that "[i]n August 1982 . . . International comprised 19,788 Rotary Clubs in 157 countries, with a total membership of about 907,750." 107 S. Ct. at 1943. In addition, while individuals were admitted to membership according to a "classification system," membership rules and procedures were left up to the local. Although membership was limited to men, local Rotary Clubs ranged in size from 20 to 900 members, had no upper limit on membership and were encouraged to enlarge the membership to include a "cross-section of the business and professional life of the community." 107 S. Ct. at 1946. The Court also found that many of Rotary Clubs' central activities were carried on in the presence of strangers, Rotary Club members from other chapters were welcome at meetings and members were encouraged to invite business associates and competitors to meetings. Joint meetings and other joint activities were permitted, and Rotary Clubs were encouraged to seek media coverage of their meetings and activities. 107 S. Ct. at 1946-47. Thus, the Court's analysis of Rotary Clubs was premised on an examination of the organization's practices and policies and their impact on the club's

private status. Only after performing such an analysis did the Court find Rotary Clubs to be outside the zone of privacy which would entitle them to constitutional protection.

In *Roberts*, the Court focused on the fact that in 1981, the Jaycees "had approximately 295,000 members in 7,400 local chapters affiliated with 51 state organizations. There were at that time about 11,915 associate members." 468 U.S. at 613. Moreover, the Jaycees were actively engaged in "community programs related to charity, sports, and public health." 468 U.S. at 614. In addition, the many thousands of Jaycees' members around the country were admitted to membership without having to meet any established criteria save for a requirement that the applicant be a male between the ages of 18 and 35. 468 U.S. at 613. Of pivotal significance, the Jaycees also permitted "numerous nonmembers of both genders regularly [to] participate in a substantial portion of activities central to the decision of many members to associate with one another, including many of the organization's various community programs, awards ceremonies, and recruitment meetings." 468 U.S. at 621.

The unifying principle in *Roberts* and *Rotary* is that the constitutional analysis must focus on the nature of the organization's objective characteristics, its policies, its practices and the degree to which the policies and practices of the association reinforce the distinction between members and nonmembers. None of the Court's factors is exclusive; indeed, because a fundamental right is involved, a club is entitled to show a whole host of factors which demonstrate that its "club life" renders it private.

The Court's analyses in both *Rotary* and *Roberts* of the association's practices and policies is supported by a body of federal and state case law developed over the past 25 years which has considered whether an association is private. See, e.g., *Kiwanis International v. Ridgewood Ki-*

wanis Club, 806 F.2d 468, 473 (3d Cir. 1986) (key test for whether an association is a "place of public accommodation" is whether it issues open invitation to members of public at large, or is selective in its membership policies), *cert. dismissed*, 56 U.S.L.W. 3167 (U.S. Sept. 8, 1987); *New York v. Ocean Club, Inc.*, 602 F. Supp. 489, 496 (E.D.N.Y. 1984) (Ocean Club held to be a "place of public accommodation" because membership extended to large, indefinite segment of public with no plan of exclusivity, many members have no control over club governance, members actively solicited from public at large and major club facilities used by general public); *United States v. Trustees of the Fraternal Order of Eagles*, 472 F. Supp. 1174, 1175 (E.D. Wis. 1979) (in considering whether a club is private, courts have considered, *inter alia*, selectivity, membership control over internal governance, whether the organization advertises and the use of club facilities by nonmembers); *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1203 (D. Conn. 1974) (the district court identified eight factors which should be considered in determining whether a club is private, including, *inter alia*, selectivity in admissions, existence of formal membership procedures, degree of membership control over internal governance and the use of club facilities by nonmembers); *Wright v. Cork Club*, 315 F. Supp. 1143 (S.D. Tex. 1970) (Cork Club found to be a "place of public accommodation" because it did not carefully screen applicants for membership, did not limit use of facilities to members and *bona fide* guests, was not controlled by the membership, was not operated solely for the benefit and pleasure of members and directed publicity to more than just its members for their information and guidance); *United States Powers Squadrons v. State Human Rights Appeal Board*, 59 N.Y.2d at 401, 452 N.E.2d at 1199, 465 N.Y.S.2d at 871 (Power Squadrons not "distinctly private" because it did not have a plan or purpose of exclusivity but encouraged and solicited public participation in its pro-

grams, courses and membership, did not limit its services to members only, did not operate solely for the benefit of squadron members only and did not direct publicity exclusively to members for their information and guidance); see generally Note, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. Rev. L. & Soc. Change at 223-24.

Of all these factors, the most important criterion to be considered is selectivity. In determining whether a club is private, the Court has held that the focus is whether there is a "plan or purpose of exclusiveness." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1969); *Tillman v. Wheaton-Haven Recreation Association, Inc.*, 410 U.S. 431, 438 (1973) (no indicia of privacy where membership is open to every white person within the geographic area and no selective element other than race is taken into account). A club in which membership is determined by subjective, rather than objective, criteria is one which has aimed to assure congeniality by purposefully including persons of similar styles and tastes. In such a club, members are not fungible; indeed, the loss or addition of even one can indelibly change the association's character. In this context, the forced admission of members pursuant to law is particularly destructive of a club's *raison d'être*: in a private group, the selection of one's social intimates should be a product of personal choice, not governmental edict.¹⁰

¹⁰ As will be demonstrated, *infra*, Local Law 63 imposes just such a burden on private associations. This is because once an organization is defined as a "place of public accommodation" under Title 8 of the Administrative Code, the City Human Rights Commission possesses sweeping power to order "the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons." § 8-109(2)(c) (included in Appendix to this Brief). This power, coupled with Local Law 63's mandate, accords any member the standing to challenge any internal policy of the club which, in the member's judgment, constitutes a deprivation of a privilege. The challenge could be

Contrary to these fundamental principles, Local Law 63 forecloses the constitutionally-compelled analysis for determining whether a private club is among the class of associations the Court has found to be entitled to constitutional protection.¹¹ Rather, the local law establishes the irrebuttable presumption that an association which meets its three-pronged test is entitled to no constitutional protection at all, irrespective of whether it possesses the attributes which the Court has deemed constitutionally significant.¹² The fundamental flaw in Local Law 63, therefore, is that it does not adequately permit a club to establish, through a "careful assessment" of its "objective characteristics," that it is private and therefore worthy of constitutional protection under the framework established in *Roberts* and *Rotary*.

Indeed, Local Law 63 precludes any consideration of selectivity, the very factor on which the Court has particularly focused its inquiry. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. at 236; *Tillman v. Wheaton-Haven Recreation Association, Inc.*, 410 U.S. at 437-38. Nor does the local law permit consideration of any of the myriad

as significant as the denial of membership to an applicant, or as mundane as the allotment of athletic facility hours or equality of physical plant facilities for a gender-based class of members.

¹¹ The Court of Appeals erred, therefore, when it described Local Law 63's three prongs as "permissive." JS 11a. Once an association is found to be within the three prongs, the inquiry is terminated and it is deemed not to be "distinctly private" for all purposes.

¹² The Court has often recognized that a first amendment challenge to statutes also implicates equal protection concerns. *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 94-95 (1972) (and authorities cited therein at n.3); *Arkansas Writers' Project, Inc. v. Ragland*, ___ U.S. ___, 107 S. Ct. 1722, 1726 n.3 (1987). Given the fact that Local Law 63 fails to draw a meaningful distinction between clubs which are public and clubs which are private under the freedom of association analysis set forth in *Roberts* and *Rotary*, it necessarily creates an improper classification between clubs within the ambit of the local law and those without it.

of additional factors, including self-governance, which permeate club life and assure its private nature. Impermissibly, the local law applies a truncated and mechanical test where the Constitution compels a far-reaching and fluid one.

For example, Local Law 63 applies to all clubs with more than 400 members. While the Court did consider the size of the association to be a relevant factor, it did not fix a specific number beyond which an organization is deemed to warrant no constitutional protection. In *Rotary*, for example, the Court noted that the size of the local Rotary Clubs ranged from "fewer than 20 to more than 900." 107 S. Ct. at 1946. Size, like all other factors considered by the Court, is relative and not determinative.¹³

In addition, by defining "members" in the Regulations¹⁴ to include all classes of members, the local law necessarily does not speak to the number of persons who actually use the club on a day to day basis. Thus, if 90% of club usage is based upon the participation of 10% of the membership, this factor should, at base minimum, be *relevant* to the analysis. The local law also does not take into account the effect the demographics of the club's location may have on size. In a small town or outer borough of New York City, for example, a club with relatively few members could wield considerable influence in the business life of

¹³ Indeed, local jurisdictions throughout the country have resorted to other numerical standards showing there is no magic to the number 400. See, e.g., District of Columbia, Bill 7-157 (enacted Oct. 1987) (350); Buffalo, N.Y., Ordinance Amendment - New Article XXIII Added to Chapter VII - Discriminatory Practices Concerning Membership or Facilities (enacted Sept. 16, 1987) (100).

¹⁴ "Members" are defined as "individuals belonging to any class of membership offered by the institution, club, or place of accommodation including, but not limited to, full membership, resident membership, nonresident membership, temporary membership, family membership, honorary membership, associate membership, membership limited to use of dining or athletic facilities, and membership of members' minor children or spouses." Regulations § 1(e), JA 71.

the community. In Manhattan, however, a club of 1,000 members could be insignificant.

By ignoring selectivity and instead focusing on an arbitrary number, the local law does not permit an examination of the role selectivity plays in size. NYSCA's clubs have highly selective membership practices which together constitute a complex process of assuring confluence among their members. This process reinforces a sense of community notwithstanding the number of members. For example, these admission practices may require that prospective members be carefully screened, proposed and seconded by persons who are already club members. Applicants are often subjected to searching interviews and recommendation requirements by membership committees. See generally JA 32. As a result, the membership is composed of an interlocking and overlapping network of relationships between persons who know each other as social intimates. Such organizations would ordinarily possess the requisite degree of intimacy to bring them within the Court's zone of protected association, notwithstanding the fact that they may have more than 400 members.

Nor does the "provides regular meal service" criterion of Local Law 63 bear any relationship to the kinds of attributes the Court considered significant in *Roberts* and *Rotary*. In neither case (nor in the various lower court decisions which have considered the issue) is there mention of food service, or the lack of it, as an association practice which may influence whether a club is sufficiently private for constitutional protection. Standing alone, the practice of sharing a meal with associates is as much a social phenomenon as it is a commercial one. Nor is there any suggestion that Local Law 63 is aimed at clubs which operate as restaurants, because it is equally applicable to organizations which limit their dining rooms to members only as to those which permit nonmembers. Accordingly, the local law's use of this criterion to create an irrebuttable presumption cannot be sustained.

Local Law 63's concept of *regular* receipt of payments from or on behalf of nonmembers for furtherance of trade or business¹⁵ has never been analyzed by the Court as relevant to, much less conclusive of, a club's private status. Indeed, the Court recognized in *Rotary* that the fact that a nonmember corporation pays for a member's dues is not dispositive of whether a club is private. The record in *Rotary* disclosed that "'some individual Rotarians derive sufficient business advantage from Rotary to warrant deduction of Rotarian expenses in income tax calculations or to warrant payment of those expenses by their employers. . . .'" 107 S. Ct. at 1944 (citation omitted). The Court,

¹⁵ The City claims that it is justified in classifying clubs which regularly receive payments directly or indirectly from *nonmembers* for furtherance of trade or business as not distinctly private. What the City fails to say is that Local Law 63 also classifies as non-private a club which *never* receives any payment directly or indirectly from a nonmember for furtherance of trade or business. Under Local Law 63, as construed by the Regulations, a club is not distinctly private if it receives payments from its *own members* for nonmember guests if those payments are in furtherance of trade or business. Regulations § 1(c), JA 70 ("Payment on behalf of a nonmember" shall mean payment by a *member* or nonmember for expenses incurred for dues, fees, use of space, facilities, services, meals or beverages by or for a nonmember." (Emphasis added.)). If members of a club on 52 occasions have one nonmember guest for lunch (or even just a drink) during the course of a year and the conversation with the guest is in furtherance of trade or business, then the club is no longer distinctly private under the local law as construed by the regulation. This is so even if the member making the payment is not reimbursed for it by anyone. The club would be regularly receiving payment from members for meals or drinks for nonmembers (guests) and it is doubtful that a club could meet the burden of proving that the lunches or drinks were not in furtherance of a trade or business without taking a transcript of the conversation between the members and the nonmember guest. The cost of the 52 lunches or drinks would be a *minuscule* percentage of the payments received by the club from its members. Local Law 63, as interpreted by the Regulations, is completely inconsistent with the ordinary meaning of the term "distinctly private." It has never affected the private nature of a club to have its members discuss business at the club over a meal or a drink with a nonmember guest.

however, did not address these facts as significant to, let alone dispositive of, its analysis. Nevertheless, Local Law 63, as interpreted by the Regulations,¹⁶ adopts the impermissible position that where an organization which is otherwise selective and private accepts revenues directly or indirectly from or on behalf of nonmembers (including payments by members for nonmember guests) it thereby automatically loses its "distinctly private" status.

The third prong also does not meet the Court's requirement that the participation of nonmembers be substantial in order to render the association public. In *Rotary*, the Court noted that "[m]any of the Rotary Clubs' central activities are carried on in the presence of strangers." 107 S. Ct. at 1946 (emphasis added). In *Roberts*, the Court relied on the fact that "[n]umerous non-members of both genders *regularly* participate in a *substantial* portion of [Jaycees'] activities" 468 U.S. at 621 (emphasis added). The third prong rejects any requirement of substantial business-oriented conduct. "Regularly," as defined in the Regulations, does not mean "substantial." JA 71. Thus if a club with four hundred fifty members and a \$250,000 budget receives 52 ten dollar checks over a twelve month period from a single member relating to the trade or business of a nonmember, the club automatically loses its entitlement to the "distinctly private" exemption. It is impossible to reconcile, however, how the acceptance of trivial and insignificant amounts of such payments renders

¹⁶ In evaluating a facial challenge to a state law, the Court must consider any limiting construction that a state court or enforcement agency has proffered. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982). This is also the case in New York State practice. See, e.g., *Fineway Supermarkets, Inc. v. State Liquor Authority*, 48 N.Y.2d 464, 468, 399 N.E.2d 536, 538, 423 N.Y.S.2d 649, 651 (1979) ("By now it is settled law that the interpretation of a statute by the agency charged with its enforcement will be respected by the courts if not irrational or unreasonable . . ."); see generally 56 N.Y. Jur., *Statutes* § 179 (1967).

a club "public," especially where, as here, fundamental constitutional protections are at stake.

This is particularly true where the nonmembers who make payments or enter the club as guests are excluded from and have no impact on the use, operation and governance of the club. Even if nonmembers believe themselves to be benefited by the club, it is simply an unintended and incidental occurrence which has no relation to the club's central purposes and activities.

The third prong of Local Law 63 also does not distinguish between discreet, social interactions (such as buying a guest a meal or a drink) which may have a business component, from a member's overt efforts to secure commercial advantage from the membership at large by, for example, peddling his wares in the club lounge. In the first instance, the relationship between the two persons remains private and separate; in the second, the club serves as a substitute for a marketplace or convention. Surely, these factors should be relevant to a meaningful consideration of a club's private character.

Local Law 63 is also impervious to the fact that, even if arguably business-related activity takes place, the conduct of club members is quite distinct from the association's conduct. For example, many clubs may have strict rules prohibiting club members from conducting any business in the "common areas" of the club, including the dining room, lounge and library.¹⁷ To the extent club facilities are available, on a limited basis, for an individual member's commercial or business purpose, however, the club member must reserve a private room for the use of his or her nonmember guests. Other club members are not

¹⁷ Given this fact, it is difficult to reconcile the second prong's regular food service requirement as anything other than an effort to isolate a particular group of clubs without regard to their private nature. See JS 35a-36a (discussion by trial court rejecting NYSCA's bill of attainder challenge to Local Law 63).

entitled to participate in these events; conversely, non-member guests are not free to roam the club and enjoy any other activities or facilities. Where the club is concerned, the private events held on its premises by its members have no impact on club life, whether these events are business meetings, weddings or class reunions. The conduct of these clubs stands in marked contrast to the conduct at issue in *Rotary*, where the Court noted that "[m]embers are encouraged to invite business associates and competitors to meetings" and joint activities with other clubs, including joint meetings, were permitted. 107 S. Ct. at 1946-47.

As described in *Rotary*, the essence of the Court's inquiry should be whether an association "rather than carrying on [its] activities in an atmosphere of privacy, seek[s] to keep its 'windows and doors open to the whole world.'" 107 S. Ct. at 1947. NYSCA's members do not advertise, do not seek publicity and have rules which prohibit discussing club business with outsiders. See generally JA 32. Rather than standing "open to the whole world," NYSCA's clubs have their windows shuttered and only members and their guests may cross the threshold. Local Law 63's third prong, by misfocusing and improperly limiting the relevant inquiry, does not permit consideration of critical factors which demonstrate a club's private nature.

Local Law 63 is also insensitive to the plight of numerous small clubs which rely upon the rental of a portion of their clubhouse space to augment the income they receive from membership dues. Thus a club which is composed of persons with modest incomes may not have the option of foregoing all outside revenue because it simply cannot increase its dues and maintain its membership. Provided a club rents its facilities on a non-discriminatory basis, there is no valid legislative purpose to be achieved by foreclosing a club from demonstrating why such revenue is not inconsistent with its private nature. It is the screening and acceptance on subjective grounds of the

member, not his financial backer, which is relevant to a public versus private analysis. In *Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis International*, in an analogous context, the court observed that:

The fact that individual members may use their membership in a club to further their own business interests does not, in any way, change the avowed purposes of the organization, or convert it into a commercial club. There can be no doubt that membership in a golf club, for example, may be used by some members to promote business connections and that certain employers of such members might even pay their dues. It is also conceivable that there are some who join a charitable or religious organization and become active therein, because of possible selfish or commercial benefits. Should the activities or motives of some individual members be sufficient to convert such organization itself into a commercial enterprise?

83 Misc. 2d 1075, 1078, 374 N.Y.S.2d 265, 268 (Sup. Ct. Nassau Co. 1975), *aff'd*, 52 A.D.2d 906, 383 N.Y.S.2d 383 (2d Dep't 1976), *aff'd*, 41 N.Y.2d 1034, 363 N.E.2d 1378, 395 N.Y.S.2d 633, *cert. denied*, 434 U.S. 859 (1977). *Cf. Kiwanis International v. Ridgewood Kiwanis Club*, 806 F.2d at 478 (Adams, J., concurring) (fact that employers often pay dues of employee members not dispositive in determining whether association is "distinctly private").

Given the constitutional issues at stake, Local Law 63 is not sufficiently narrowly drawn. In order to achieve its objective of eradicating discrimination in places of public accommodation, the City has resorted to an irrebuttable three-prong test which fails to distinguish between truly private and protected associations and clubs which appropriately may be subject to regulation. The Court stated in *Rotary* that "[w]hether the 'zone of privacy' established by the First Amendment extends to a particular club or

entity requires a careful inquiry into the objective characteristics of the particular relationships at issue." 107 S. Ct. at 1947 n.6. The City, however, could have adopted a less restrictive means for achieving its purposes simply by permitting a club, in conformity with *Roberts* and *Rotary*, to show all the objective, relevant factors at the hearing already mandated by the public accommodations law. Admin. Code § 8-109(2)(b).¹⁸ The City could also have adopted a procedure which was sensitive to the kinds of factors considered by the Equal Employment Opportunity Commission to determine whether an organization qualifies as a *bona fide* private membership club, exempt from Title VII coverage pursuant to the Civil Rights Act of 1964, 42 U.S.C. § 2000a(e).¹⁹ Local Law 63, however, does not per-

¹⁸ At least one jurisdiction has attempted to draft legislation which is more responsive to the constitutional concerns of *Roberts* and *Rotary*. Wilmington, Delaware has enacted an amendment to its public accommodations law which adopts some aspects of Local Law 63's three prongs but also permits a club to show that its size, purpose, policies, selectivity, congeniality and other pertinent characteristics render it nonetheless private and protected. Ordinance No. 87-063, *as amended* (Sept. 30, 1987).

¹⁹ The Commission makes a case-by-case determination considering all relevant factors which bear on whether an organization is (i) a club in the ordinary sense of the word, (ii) is private and (iii) requires meaningful conditions of limited membership. The Commission sets forth as factors it would consider, *inter alia*, the following:

- (1) the extent to which it [the organization] limits its facilities and services to club members and their guests;
- (2) the extent to which and/or the manner in which it is controlled or owned by its membership;
- (3) whether and, if so, to what extent and in what manner it publicly advertises to solicit members or to promote the use of its facilities or services by the general public;
- (4) the size and existence of limitations on the size of the orga-

mit this careful inquiry and precludes the case by case adjudication which the Court has deemed necessary to protect fundamental constitutional rights. Local Law 63 is, therefore, unconstitutional.

B. Local Law 63 Violates NYSCA's Members' Rights of Expressive Association.

The Court has stated that the right of expressive association is necessary to make the other guarantees of the first amendment meaningful:

An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. . . . According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.

Roberts, 468 U.S. at 622 (citations omitted).

The first amendment also protects associations formed for a variety of purposes, including social ones:

The Court has . . . recognized that the right to engage in activities protected by the First Amendment implies "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, reli-

nization;

(5) the membership eligibility requirements.

Equal Employment Opportunity Commission, Policy Statement: Bona Fide Private Club Exemptions (Signed July 22, 1986), EEOC Notice Number N-915 (July, 1986).

gious, and cultural ends." . . . For this reason, "[i]mpediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment. . . ."

Rotary, 107 S. Ct. at 1947 (citations omitted).

Roberts recognized that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together." 468 U.S. at 623. Local Law 63 impermissibly precludes associations that come within the tripartite test from demonstrating that, by being forced to accept a member whom they do not desire, their ability to express their views may be compromised.

In *Rotary*, the Court examined Rotary Clubs' expressive activities and noted that "[a]s a matter of policy, Rotary Clubs do not take positions on 'public questions,' including political or international issues." 107 S. Ct. 1947. However, the Court found that Rotary Clubs did engage in a variety of commendable service activities that enjoy first amendment protection. Notwithstanding these rights of expressive association, the Court held that the application of California's anti-discrimination law to Rotary Clubs would have no effect on their basic activities. "It does not require them to abandon their basic goals of humanitarian service, high ethical standards in all vocations, goodwill, and peace. Nor does it require them to abandon their classification system or admit members who do not reflect a cross-section of the community." 107 S. Ct. at 1947. Indeed, the Court stated that by opening up membership to women, Rotary Clubs would obtain a broader cross-section of the community, a development which would be consonant with

the clubs' activities. 107 S. Ct. at 1947. See also *Roberts*, 468 U.S. at 627.

The significance of the Court's analysis is that it examined the Rotary Clubs' claim to see whether in fact its expressive association would be affected. Local Law 63, however, does not permit any private club which meets the three prongs—whether organized for primarily political, artistic, cultural, social or athletic purposes—to prove that by being required to admit a member whom club members do not want, the nature of the club's expressive association may be compromised. For example, certain clubs covered by Local Law 63 may well exist primarily for purposes of espousing unpopular ethnic, racial or gender related positions. The forced admission of persons who either espouse contrary views or whose presence is inimical to the views of the club, plainly interferes with the right of expressive association. "Freedom of association . . . plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623. See also *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 n.22 (1981) (freedom to associate "necessarily presupposes the freedom to identify the people who constitute the association and to limit the association to those people only."); cf. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) ("[w]e are faced with a state measure [compulsory display of State motto "Live Free or Die" on automobile license plate] which forces an individual, as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'").

Similarly, the decision of some of NYSCA's members to organize along single gender lines is an expression of their belief that certain types of social intimacy and discourse may only be achieved in single sex settings. See *Griswold v. Connecticut*, 381 U.S. at 483 (the right of

association includes the right to express one's attitudes or philosophies by membership in a group); *NAACP v. Alabama*, 357 U.S. at 460-61 (freedom to engage in association for advancement of beliefs and ideas inseparable aspect of liberty). Unlike community service organizations which are affiliated with large international umbrella organizations, the compulsory admission of new members in violation of selective clubs' membership policies defeats their foundational premises and philosophies.

By requiring private associations to accept members whom they do not want, NYSCA's members' rights of association are burdened by Local Law 63. *Roberts*, 468 U.S. at 623. Accordingly, to justify the intrusion, "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project, Inc. v. Ragland*, 107 S. Ct. at 1728.

The Court has held that the state's interest in eradicating discrimination is compelling in areas which involve access to publicly available opportunities. See *supra* at 13. But, Local Law 63 seeks to reach conduct which takes place in a totally private sphere—an area in which the City's interest is dramatically less compelling, if it exists at all.²⁰ However, even if there is some basis for finding the City's interest in this private sphere significant, Local Law 63 is neither necessary to the accomplishment of any legitimate goal nor sufficiently narrowly drawn to pass constitutional muster. This is because the local law does not permit the association to demonstrate that its expressive association may be compromised by the admission of an unwanted member. The City has never demonstrated

²⁰ In his testimony before the City Council prior to Local Law 63's enactment, the Corporation Counsel agreed that private clubs may discriminate. Excerpts from the Meeting of the Committee on General Welfare, December 22, 1983 at 6, 18-19.

why a case by case adjudication, which permits a club to make this showing, is not the most appropriate means for resolving the competing interests which are at stake.

Local Law 63 imposes the full panoply of anti-discrimination legislation (including ordering the admission of new members) on all kinds of associations on the ground that, by satisfying the tripartite test, the association has forfeited its expressive rights—ostensibly because it has become “commercial,” and, therefore, public. JS 30a. This conclusion is erroneous because in the course of human interactions there can be business components, social components, intimate components or all three. As Justice O'Connor explained:

Many associations cannot readily be described as purely expressive or purely commercial. No association is likely ever to be exclusively engaged in expressive activities And innumerable commercial associations also engage in some incidental protected speech or advocacy. The standard for deciding just how much of an association's involvement in commercial activity is enough to suspend the association's First Amendment right to control its membership cannot, therefore, be articulated with simple precision

[A]n association should be characterized as commercial, and therefore subject to rationally related state regulation of its membership and other associational activities, when, and only when, the association's activities are not predominantly of the type protected by the First Amendment. It is only when the association is predominantly engaged in protected expression that state regulation of its membership will necessarily affect, change, dilute or silence one collective voice that would otherwise be heard.

Roberts, 468 U.S. at 635-36 (O'Connor, J., concurring). Local Law 63, however, does not distinguish between predominantly commercial associations and others which have been organized for predominantly social, cultural, political or other expressive purposes, but which may have incidental commercial activity. This is because Local Law 63 does not permit associations to demonstrate that the alleged commercial activity (receipt of income from or on behalf of a nonmember directly or indirectly for furtherance of trade or business) is merely incidental to the club's purposes and, when balanced with a host of other factors, does not impair a club's private character.

Moreover, the enforcement of Local Law 63 will directly abridge the rights of freedom of association, privacy and speech enjoyed by NYSCA's members. For example, under Regulation ¶ 1(d), JA 70-71, whether a meal payment is in furtherance of trade or business can only be determined by the content of the participants' conversation during the meal. In order to preserve traditional membership policies of a club, Local Law 63 effectively inhibits certain kinds of speech which, while in a social setting, may indirectly be deemed to further the business interests of the speakers. It may be impossible for a club member, let alone a club administrator, to disaggregate the social and business strains of a private lunch to determine whether the third prong attaches at all. Indeed, the third prong may well be triggered where a member entertains a business associate and engages in entirely social conversation. Such a result is contrary to basic precepts of constitutional freedoms.

Local Law 63 seeks to destroy the foundations of private clubs and associations. Many of NYSCA's members have created a good will among their membership by assiduously guarding their rights of association, privacy and speech. Indeed, membership in private social clubs expresses self-identification. *Griswold v. Connecticut*, 381 U.S. at 483; Karst, *The Freedom of Intimate Association*, 89 Yale L.J.

at 635-37. Changing the nature of the club necessarily infringes on the identification.

The unprincipled consequences of Local Law 63 are infinite: women's organizations will be forced to admit men; a gay businessman's association would be forced to admit women; a black businessman's organization would be forced to admit whites; an Italian anti-defamation league would be forced to admit non-Italians; and a politically-defined group would be forced to admit its ideological opposites. The richness of American culture is diluted, not enhanced, by such results. Discrimination in *public* places is unjust, and the law confers upon federal, state and local officials the appropriate authority to remedy such proscribed conduct. Local Law 63, because of its failure properly to distinguish between private and public places, is a direct assault on cherished constitutional values, and should be declared void.

C. Local Law 63 Is Unconstitutional Because It Is Overbroad.

In *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, the Court reiterated the contours of the overbreadth analysis:

Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face "because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid."

____ U.S. ____ , 107 S. Ct. 2568, 2571 (1987) (citations omitted).

Overbreadth analysis has been applied to activities which the first amendment, by its broad terms, seeks to protect.

See, e.g., *Board of Airport Commissioners*, 107 S. Ct. at 2568 (ordinance which prohibited all first amendment activities within the Central Terminal Area at Los Angeles International Airport declared unconstitutional because overbroad); *City of Houston v. Hill*, ____ U.S. ____ , 107 S. Ct. 2502 (1987) (ordinance which rendered it unlawful to interrupt a police officer in the performance of his or her duties is unconstitutionally overbroad under the first amendment); *United States v. Robel*, 389 U.S. 258, 266 (1967) (overbreadth attack sustained because statute "seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights."); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (city ordinance which prohibited "annoying" assemblies of three or more persons on the street "unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.").

In *Roberts*, the Court considered the Jaycees' claim that the Minnesota public accommodations statute was overbroad because it was susceptible of improper application. 468 U.S. at 630. In rejecting this challenge, the Court relied on the fact that the Minnesota Supreme Court was willing "to adopt limiting constructions that would exclude private groups from the statute's reach, together with the commonly used and sufficiently precise standards it employed to determine that the Jaycees is not such a group" 468 U.S. at 630-31. Local Law 63, however, is not susceptible of a limiting construction and does not employ commonly used or precise standards. The local law's three prongs are fixed and immutable. More significantly, however, the three prongs are not commonly-used indicia of whether an association is private; rather, they represent the City's arbitrary selection of criteria it believed would apply to certain private groups whose practices it deemed offensive.

Under Local Law 63 there also exists a substantial likelihood that associations which are organized around the most cherished of all constitutional protections, *viz.*, the exercise of political speech and religious freedom, will be chilled by the prospect of the very kind of governmental interference the first amendment was intended to prohibit. Threatening to regulate the membership practices of groups which are organized to promote unpopular political or religious viewpoints, and which may require them to admit members whose views are antagonistic to those of the association, plainly compromises rights the Court has repeatedly deemed worthy of protection. *Roberts*, 468 U.S. at 630; *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. at 122 n.22.

In addition, other groups not currently subject to Local Law 63 will have their associational, speech and privacy rights chilled by the local law. For example, a social, political or cultural club presently composed of 375 members will avoid increasing its membership for fear of coming within the provision's 400-members criterion and exposing its members to an investigation to ascertain whether it is indeed a place of public accommodation. Members' speech rights will be affected as the Human Rights Commission casts about for some means of ascertaining whether a payment was "for furtherance of trade or business." And, as described above, to the extent regulation under Local Law 63 turns on the content of what was discussed during a meeting or meal, it is a flagrantly unconstitutional regulation of speech, which will necessarily cause club members to engage in a self-imposed censorship to avoid even the accusation of having conducted a business discussion. Accordingly, Local 63 is unconstitutional.

II. LOCAL LAW 63's EXEMPTION OF BENEVOLENT ORDERS AND RELIGIOUS CORPORATIONS VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION.

"The Equal Protection clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). See *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587-88 (1979). When legislation creates an inconsistent burden on the fundamental rights of similarly-situated persons, such an enactment, absent a compelling state interest, is unconstitutional. See, e.g., *Plyler v. Doe*, 457 U.S. at 217 n.15 ("In determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein."); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (applying fundamental rights standard of equal protection analysis in right to associate context); see also *Rotary*, 107 S. Ct. at 1947; *Shapiro v. Thompson*, 394 U.S. 618 (1969) (denying welfare benefits to applicants for failure to meet residency duration requirements).

A compelling state interest alone, however, will be insufficient to uphold the statute; the law must be drawn in a manner so that it employs the least drastic means to achieve its avowed purpose. See, e.g., *Attorney General of New York v. Soto-Lopez*, ___ U.S. ___, 106 S. Ct. 2317, 2322 (1986) (where the state law infringes a constitutionally protected right, the state must demonstrate "that its classification is necessary to accomplish a compelling state interest."); *Plyler v. Doe*, 457 U.S. at 217 ("With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to dem-

onstrate that its classification has been precisely tailored to serve a compelling governmental interest.""); *Shapiro v. Thompson*, 394 U.S. at 631; *Shelton v. Tucker*, 364 U.S. 479, 488-89 (1960). The invocation of the strict scrutiny standard of review carries with it a presumption of the challenged statute's unconstitutionality. See, e.g., *Plyler v. Doe*, 457 U.S. at 216. As demonstrated in Point I, *supra*, Local Law 63 affects NYSCA's members' fundamental rights of association, privacy and speech; accordingly, it must withstand a heightened scrutiny to survive challenge.

After creating the three-pronged litmus test, Local Law 63 provides:

For the purposes of this section a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or the religious corporations law shall be deemed to be in its nature distinctly private.²¹

²¹ "Benevolent Orders" are associations which are listed in the Benevolent Orders Law, N.Y. Ben. Ord. §§ 1 *et seq.* (McKinney 1951, Supp. 1987) and include Masons, Knights of Columbus, B.P.O. Elks, Loyal Order of Moose and a number of ethnic groups, such as the Polish Legion of American Veterans. The Benevolent Orders Law does not define these associations. The Insurance Law, however, defines a "fraternal benefit society" as "an incorporated society, order or supreme lodge . . . formed, organized and carried on solely for the benefit of its members and of their beneficiaries and not for profit, operating on a lodge system and having a representative form of government. . . ." N.Y. Ins. Law § 4501(a) (McKinney 1985).

A "Religious Corporations Law corporation" is a corporation created for religious purposes, N.Y. Relig. Corp. § 2 (McKinney Supp. 1987), and consists of the trustees and all persons who have the right to vote at corporate meetings. It has jurisdiction over all the property and temporal affairs of the church, as distinct from the religious society. *Metropolitan Baptist Church v. Braxton*, 137 N.Y.S.2d 294 (Sup. Ct. New York Co. 1964) (not officially reported), *aff'd*, 285 A.D. 1044, 141

Admin. Code § 8-102(9). On its face, Local Law 63 denies equal protection to similarly-situated persons: private social clubs on one hand and benevolent orders and religious corporations on the other. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 78-79 (1981). Cf. *Arkansas Writers' Project, Inc. v. Ragland*, 107 S. Ct. at 1727 (Arkansas sales tax scheme unconstitutional because it treated some magazines less favorably than others); *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 581 (1983) (under a first amendment analysis, the Court struck a state tax statute because it "is facially discriminatory, singling out publications for treatment that is . . . unique in Minnesota tax law.").

Local Law 63 is ostensibly designed to permit the classification of clubs as public accommodations if certain com-

N.Y.S.2d 509 (1st Dep't 1955). Although such corporations are generally subject to the not-for-profit corporation law, N.Y. Relig. Corp. Law § 2-b (McKinney Supp. 1987), the Religious Corporations Law prevails in the event there is a conflict between the two. *Rector, Church Wardens and Vestrymen of St. Bartholomew's Church in the City of New York v. Committee to Preserve St. Bartholomew's Church, Inc.*, 84 A.D.2d 309, 314, 445 N.Y.S.2d 975, 978-79 (1st Dep't 1982). The law sets forth "general provisions" governing these corporations, including general powers to hold and convey property and to invest funds. Each religious denomination has a separate Article which sets forth the procedures for recognition as a religious corporation. They cover the business aspects of these organizations, including procedures for incorporating, voting, notice of meetings, certificate of incorporation and numbers of trustees.

An "education corporation" is defined as "a corporation (a) chartered or incorporated by the regents or otherwise formed under this chapter, or (b) formed by a special act of this state with its principal purpose an education purpose and which is a member of the university of the state of New York, or (c) formed under laws other than the statutes of this state which, if it were to be formed currently under the laws of this state, might be chartered by the regents" N.Y. Educ. Law § 216-a(1) (McKinney Supp. 1987). Such corporations are largely governed by the not-for-profit corporations law, N.Y. Educ. Law § 216-a(4). Thus, a religious denomination which incorporates its parochial school under this law would be covered by the exemption.

mercial activities regularly occur there. No testimony before the City Council indicated that benevolent orders or religious corporations did not engage in the very practices—and thereby disserve the City's interests in promoting anti-discrimination laws—which Local Law 63 was designed to address. See, e.g., JA 15, Local Law 63 ("Because small clubs, benevolent orders and religious corporations have not been identified in testimony before the Council as places where business activity is prevalent, the Council has determined not to apply the requirements of this local law to such organizations." (Emphasis added.)). The City seeks to uphold Local Law 63 based upon a lack of evidence before the City Council with respect to, *inter alia*, whether any significant business activity occurs at the meeting places of benevolent orders and religious corporations.

An absence of evidence cannot serve as a rational basis for a statutory classification, let alone a compelling one. The City must show affirmatively that the evidence before the legislature reasonably supported the exclusion. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 60-61 (1986) (Brennan, J. dissenting) (legislative "findings" were "purely speculative conclusions" and "were not such as are required to justify the burdens the ordinance imposed upon constitutionally protected expression.")²² Cf. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981).

Indeed, to the extent that there was any evidence at all before the City Council, it supported the conclusion

²² The Court has struck down laws which create irrational classifications especially where the legislative history indicates that no affirmative evidence supported a class-based exemption. See, e.g., *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266, 272-74 (1936) ("In the absence of any such showing, we have no right to conjure up possible situations which might justify the discrimination. The classification is arbitrary and unreasonable and denies the appellant the equal protection of the law."); cf. *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. at 581.

that there is no distinction between the exempt organizations and those covered by Local Law 63.²³ Just as benevolent orders are formed primarily for the ongoing social relationship of their members so, too, as the record demonstrates, are NYSCA's members formed. JA 32. Various cases have shown that benevolent orders conduct their affairs no differently from certain private clubs which were targeted by the City Council. See, e.g., *Pennsylvania Human Relations Comm'n v. The Loyal Order of Moose, Lodge 207*, 220 Pa. Super. 356, 286 A.2d 374 (1971) (Moose Lodge has dining and bar facilities available for business meals and rents out its facilities to nonmembers) (Spaulding, J.,

²³ Throughout the course of this litigation, NYSCA has opposed the City's use as substantive evidence of triple hearsay vignettes concerning the alleged practices of private clubs which were spilled across the informal legislative record maintained by the City Council. However, to the extent the Court will consider Local Law 63's "legislative history," despite its never formally having been made a part of the record at any stage of this proceeding, it reveals that the Council was presented with the December 22, 1983 written comments of the Conference of Private Organizations which stated that there was no basis for the benevolent orders exemption. See Testimony of Milton Meyer, Esq. before Committee on General Welfare, December 22, 1983 at 39. The Council also received September 21, 1983 written comments to the same effect from NYSCA. Excerpts from the Meeting of the Committee on General Welfare, December 22, 1983 at 19. See also Testimony of Albert Blumenthal, Esq., *id.* at 24-25, 59-60 (showing no basis for exemptions). Similarly, in a report entitled, "Behind Closed Doors," by Edith Lynton based on City Commission on Human Rights Hearings, annexed as an exhibit to the testimony of Jack Greenberg, the City Human Rights Commission itself argued that "after careful consideration" no exemption for religious or ethnic groups was appropriate. The Commission's view continued: "As already discussed in connection with pending legislation before the City Council, the Commission is willing to accept such exemptions as are required to secure passage, but will continue its efforts beyond 1975 to secure an all-encompassing version." *Id.* at 63. Moreover, during the public hearing on Local Law 63, Council Member Friedlander also indicated that there was no reason for the exemption. Excerpts from the Meeting of the Committee on General Welfare, December 22, 1983 at 45. See also Testimony of Linda Blackburn, Esq., *id.* at 81 *et seq.* (indicating no basis for exemption).

dissenting), *rev'd on other grounds*, 448 Pa. 451, 294 A.2d 594 (1972), *appeal dismissed*, 409 U.S. 1052 (1972); *Mason v. Eagles Lodge*, 30 A.D.2d 605, 290 N.Y.S.2d 56 (3d Dep't 1968) (Eagles Lodge maintains lodge rooms for members' social gatherings which contain a bar, recreation room and a dining room); *Courtney v. Abro Hardware Corp.*, 286 App. Div. 261, 142 N.Y.S.2d 790 (1st Dep't 1955) (Knights of Columbus leased meeting and club room which it in turn rented out for events such as weddings), *aff'd*, 1 N.Y.2d 717, 134 N.E.2d 680, 151 N.Y.S.2d 930 (1956); *Monarch Lodge No. 45 v. City of New York*, 5 Misc. 2d 414, 125 N.Y.S.2d 226, 227 (Sup. Ct. New York Co. 1953) (in denying sales tax exemption, special term finds Elks is "not operated for exclusively religious, charitable or educational purposes . . . [Elks] maintains for its members meeting rooms, offices and various other rooms, as well as a kitchen, dining room, barroom and lounge [Elks'] other income came from membership dues (which are a very small proportion of the total gross income), sales of drinks, banquets, dances, boat rides and other operations."), *aff'd*, 283 A.D. 692, 128 N.Y.S.2d 533 (1st Dep't 1954).

In light of the City's stated objective in enacting Local Law 63 to eliminate invidious discrimination in places of public accommodation, JA 16, and the foregoing testimony and cases, the City's exclusion of an entire class solely to permit it to engage in the very practices sought to be eradicated by the local law cannot be justified. By excluding benevolent orders and religious corporations from Local Law 63, the statutory scheme signals that the very conduct targeted by the local law occurs in such organizations. Moreover, the need to exempt certain organizations demonstrates that the three prongs do not adequately measure whether, in the first instance, a club is a place of public accommodation or is a private institution worthy of constitutional protection. Indeed, if the presence of 400

members or regular meal service or the fact of nonmember business activity (as described by Local Law 63) did not regularly occur in such exempt organizations, they would fail the local law's test and be excluded on that basis, just as any other group may be excluded.

The lower courts which considered NYSCA's equal protection challenge erred in upholding the classification on the ground that both benevolent orders and religious corporations are the subject of distinct bodies of law. JS 19a, 35a. Nothing in the statutes which create benevolent orders or religious corporations prohibit either group from receiving funds indirectly from nonmembers in the furtherance of trade or business. A local merchant may have as much, indeed, generally more, business reason to join the Elks or Moose or Veterans of Foreign Wars and obtain nonmember business reimbursement as another merchant may have to join a private social club. The City's effort to create a distinction between the two kinds of organizations is simply grasping at straws. Indeed, the necessity of exempting certain organizations from the three-prong definition can only signify that the allegedly commercial conduct which Local Law 63 seeks to regulate is equally prevalent in those exempt organizations. This fact in itself proves that the three prongs are not narrowly enough drawn to suit the local law's alleged purpose.

The lower courts similarly erred in holding the classification to be valid on the ground that benevolent orders are statutorily recognized as organizations founded primarily for the protection and relief of their members and their dependents, N.Y. Ins. Law § 4501(a) (McKinney 1985), and that religious corporations are "created for religious purposes," N.Y. Relig. Corp. Law § 2 (McKinney Supp. 1987). JS 17a, 35a. It is uncontroverted that many of NYSCA's members also exist for the benefit of their members. JA 32. At no point has either the City or any lower court explained why this fact does not create the same irrebuttable presumption that NYSCA's members are not

engaged in commercial activity and therefore non-public. And if mere incorporation pursuant to public law is sufficient, then certain of NYSCA's members should also qualify for such treatment. See, e.g., 1865 N.Y. Laws Ch. 594 (incorporating the University Club).

The classification system was also upheld by the lower courts on the ground that benevolent orders and religious corporations are excluded under other state statutes as well. JS 19a, 35a. Those statutory exemptions, however, either bear some relation to the purpose of the statute, N.Y. Civ. Rights Law § 53 (McKinney 1976), or exempt benevolent orders as well as a number of other institutions, N.Y. Educ. Law § 5001(2) (McKinney 1981). Significantly, the State's anti-discrimination statute, N.Y. Exec. Law § 292 (McKinney 1982), does not exempt benevolent orders and religious corporations. Nor has either the City or any lower court identified any similar exemptions in statutes involving labor, health and general welfare, real property, not-for-profit corporations and the like. New York's statutory framework shows that benevolent orders and religious corporations are generally governed by the same laws which govern private clubs and are not exempted from such laws unless a specific legislative provision, because of its purpose, would require an exemption.

Undoubtedly, the only basis for Local Law 63's invidious classification was its political expediency.²⁴ Absent the exemption presumably no law could have passed. By drawing

²⁴ This point of view was expressed on the editorial pages of the Daily News, a local New York City newspaper, when an earlier version of Local Law 63 was under consideration by the City Council. Entitled "Freedom of Association," the editorial attacked the bill as "blatantly hypocritical" for its exclusion of certain groups: "The American Legion and the Elks are excluded, we're told, because they're benevolent associations. What's benevolent about excluding women? In fact, those organizations are exempted because [Mayor] Koch and [City Council President] Bellamy know they'd lose if they tried to take on the Legion." Daily News, Dec. 28, 1983, at 33, col. 3.

the legislation in such an under-inclusive manner—notwithstanding the fact that the record evidence demonstrated no substantive distinctions between private clubs and exempt groups—the City Council violated the equal protection clause. As Justice Jackson observed in *Railway Express Agency v. New York*:

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary actions so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

336 U.S. at 112-13 (concurring). Accord Note, *Developments in the Law — Equal Protection*, 82 Harv. L. Rev. 1065, 1086 (1969) ("When the statute burdens the under-inclusive group, the political decision to implement the particular purpose is democratically less trustworthy since if those who should logically have been included in the classification had in fact been affected, they might not have approved the state's action.").

Accordingly, Local Law 63 is unconstitutional because it violates the equal protection clause of the federal Constitution.

CONCLUSION

For the foregoing reasons, NYSCA respectfully requests that the Court reverse the order and decision of the Court

of Appeals of the State of New York and declare Local Law 63 to be unconstitutional and void.

Respectfully submitted,

ALAN MANSFIELD

Counsel of Record

ANGELO T. COMETA

LOUIS J. LEFKOWITZ

DEBRA A. ROTH

PHILLIPS, NIZER, BENJAMIN,

KRIM & BALLON

40 West 57th Street

New York, New York 10019

(212) 977-9700

Attorneys for Appellant

Dated: November 19, 1987

APPENDIX

The public accommodations law further provides, in pertinent part, that:

8-107(2) It shall be an unlawful discriminatory practice for any person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin or sex of any person directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof. . . .

8-108 *Unlawful discriminatory practices—the handicapped.* The provisions heretofore set forth in section 8-107 as unlawful discriminatory practices shall be construed to include an otherwise qualified person who is physically or mentally handicapped.

8-108.1 *Unlawful discriminatory practices; sexual orientation.* 1. The provisions heretofore set forth in section 8-107 as unlawful discriminatory practices shall be construed to include discrimination against individuals because of their actual or perceived sexual orientation.

8-109 *Procedure.* 1. Any person claiming to be aggrieved by an unlawful discriminatory practice may, by himself or herself or such person's attorney-at-law, make, sign and file with the commission a verified complaint in writing which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the com-

mission. The commission upon its own motion may, in like manner, make, sign and file such complaint. . . .

2. After the filing of any complaint, the commission shall make prompt investigation in connection therewith. If the commission shall determine after such investigation that probable cause does not exist for crediting the allegations of the complaint that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in an unlawful discriminatory practice, the commission shall issue and cause to be served on the complainant an order dismissing such allegations of the said complaint as to such respondent. The complainant may, within thirty days of such service, apply for review of such action of the commission. Upon such application, the chairperson shall review such action and determine whether there is probable cause to credit the allegations of the complaint and accordingly shall enter an order affirming, reversing or modifying the determination of the commission, or remanding the matter for further investigation and action, a copy of which order shall be served upon the complainant. . . . If the commission, after such investigation, shall determine that there is probable cause to credit the allegations of the complaint, or if the chairperson after such review, shall determine that there is such probable cause, the commission shall immediately endeavor to eliminate such unlawful discriminatory practice by proceeding in the following manner:

(a) If in the judgment of the commission circumstances so warrant, it may endeavor to eliminate such unlawful discriminatory practice by conference, conciliation and persuasion. The terms

of such conciliation agreement shall include provisions requiring the respondent to refrain from the commission of unlawful discriminatory practices in the future and may contain such further provisions as may be agreed upon by the commission and the respondent, including a provision for the entry in court of consent decree embodying the terms of the conciliation agreement. . . .

(b) In case of failure to eliminate such unlawful discriminatory practice complained of, or in advance thereof as determined by the commission, it shall cause to be issued and served in the name of the commission, a written notice, together with a copy of such complaint, as the same may have been amended, requiring the respondent or respondents to answer the charges of such complaint at a hearing before a hearing officer designated by the chairperson and sitting as the commission, at a time and place to be fixed by the chairperson and specified in such notice. . . .

(c) If, upon all the evidence at the hearing, the commission, or such members as may be designated, shall find that a respondent has engaged in any unlawful discriminatory practice as defined in this chapter, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including (but not limited to) . . . the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons, evaluating applications for membership in a club that is not distinctly private without discrimination based on race, creed, color, national origin or sex, payment of compensatory

damages to the person aggrieved by such practice, as, in the judgment of the commission, will effectuate the purposes of this chapter, and including a requirement for report of the manner of compliance. . . .

8-111 *Penal provision.* Any person, employer, labor organization or employment agency, who or which shall wilfully resist, prevent, impede or interfere with the commission or any of its members or representatives in the performance of duty under this chapter, or shall wilfully violate an order of the commission, shall be guilty of a misdemeanor and be punishable by imprisonment for not more than one year, or by a fine of not more than five hundred dollars, or by both; but procedure for the review of the order shall not be deemed to be such wilful conduct.

APPELLEE'S

BRIEF

6
No. 86-1836

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NEW YORK STATE CLUB ASSOCIATION, INC.,

Appellant,

v.

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF
NEW YORK, THE CITY HUMAN RIGHTS COMMISSION AND
THE MEMBERS OF THE CITY HUMAN RIGHTS
COMMISSION,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR APPELLEES

PETER L. ZIMROTH,
*Corporation Counsel of the
City of New York,
Attorney for Appellees,*
100 Church Street,
New York, New York 10007.
(212) 566-4338 or 4330

LEONARD J. KOERNER,
FAY LEONARD,
PETER H. LEHNER,
MARTHA MANN,
of Counsel.

January 13, 1988

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QUESTIONS PRESENTED

Local Law 63 brought certain large downtown businessmen's clubs within the scope of New York City's Human Rights Law and thereby prohibited these clubs from discriminating against women and minorities. The questions presented are these:

1. Does appellant have standing to assert the alleged constitutional rights of individual club members when the appellant is an association of clubs and not an association of the individuals whose alleged rights are being asserted?

2. Should this Court consider appellant's claim that Local Law 63 is unconstitutionally overbroad when appellant has refused to supply factual information upon which the validity of the claim can be judged?

3. Is Local Law 63 overbroad and therefore unconstitutional on its face when it is extremely unlikely that the Law would reach constitutionally-protected conduct and when, in any event, state law provides ample opportunity for particular litigants to demonstrate, if they can, that Local Law 63 should not be applied to them because such applications would be unconstitutional?

4. Does the exclusion of religious corporations and benevolent orders from the scope of Local Law 63 violate the Equal Protection Clause when the exclusion is based on the City Council's study of extensive materials which did not indicate that these organizations presented the same "evil" as the clubs covered by the Law?

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<i>Members of the City Council v. Taxpayers for Vincent</i> , 466 U.S. 789 (1984)	24,30
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<i>New York ex. rel. Bryant v. Zimmerman</i> , 278 U.S. 63 (1928)	36,38,39
<i>Ohio Civil Rights Commission v. Dayton Christian Schools</i> , 477 U.S. 619, 106 S.Ct. 2718 (1986)	12,32
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<i>The University Club and The Union League Club v. The City of New York</i> , 86 Civ. 2343 (GLG) (S.D.N.Y. Mar. 17, 1987), <i>app. pending</i> , Nos. 87-7312, 7372 (2d Cir.)	13,22
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<i>Warth v. Seldin</i> , 422 U.S. 490 (1975)	22
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<i>Johnston v. Hughes</i> , 112 App. Div. 524, 98 N.Y.S. 525 (1st Dept., 1906), <i>rev'd on other grounds</i> , 187 N.Y. 446, 80 N.E. 373 (1907)	37
<i>New York State Club Association v. City of New York</i> , 69 N.Y.2d 211, 513 N.Y.S.2d 349, 505 N.E.2d 915 (1986)	11,16,17,18,31,33
<i>United States Power Squadrons v. State Human Rights Appeal Board</i> , 59 N.Y.2d 401, 465 N.Y.S.2d 871, 452 N.E.2d 1199 (1983)	17
<i>American Committee on Africa v. The New York Times</i> , No. 5787-PA (N.Y.C. Comm. on Hum. Rgts, July 19, 1974), <i>vacated on other grounds sub nom. The New York Times Co. v. City of New York Commission on Human Rights</i> , 79 Misc.2d 1046, 362 N.Y.S.2d 321 (Sup. Ct. N.Y. Co. 1974), <i>aff'd</i> , 49 A.D.2d 851, 374 N.Y.S.2d 9 (1st Dept. 1975) (per curiam), <i>aff'd</i> , 41 N.Y.2d 345, 393 N.Y.S.2d 312, 361 N.E.2d 963 (1977)	12,32
<i>Cruz v. Blecher</i> , No. 016585 (N.Y.C. Comm. on Hum. Rgts, Feb. 3, 1987)	12,32
Statutes:	
Title II of Civil Rights Act of 1964, 42 U.S.C. § 2000a(e) (1982)	2
Internal Revenue Code, 26 U.S.C. § 162(a) (1982)	7
N.Y. Benevolent Order Law §§ 1 <i>et seq.</i> (McKinney 1951)	38
N.Y. Civil Rights Law § 53 (McKinney 1976)	38
N.Y. Educ. Law § 5001(2)(c) (McKinney 1981)	38
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Administrative Code of the City of New York, Title 8 (1986)	
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45 Fed. Reg. 4954 (Jan. 22, 1980)	7
Miscellaneous:	
Burns, <i>The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality</i> , 18 Harv. C.R.-C.L. L. Rev. 321 (1983) ...	3,5
Ginsburg, <i>Women as Full Members of the Club: An Evolving American Ideal</i> , 6 Human Rights 1 (1977)	4
Hymowitz & Schellhardt, <i>The Glass Ceiling</i> , Wall St. J., Mar. 24, 1986	4
Karst, <i>The Freedom of Intimate Associations</i> , 89 Yale L.J. 624 (1980)	26
E. Lynton, <i>Behind Closed Doors: Discrimination by Private Clubs</i> (May 1975)	3,4,6,7
Schafran, <i>Private Clubs, Women Need Not Apply</i> , Foundation News (Jan/Feb 1982)	6
Schafran, <i>Welcome to the Club! (no women need apply)</i> , Women and Foundations/Corporate Philanthropy (1981)	3
L. Tribe, <i>American Constitutional Law</i> (1978)	27
Hearings Before the Committee on General Welfare, New York City Council, Dec. 22, 1983	3,4,5,6,7,8,10
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<i>The All-Male Club: Threatened On All Sides</i> , Bus. Wk., Aug. 11, 1980	3,5

IN THE
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COMMISSION,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR APPELLEES

STATEMENT

This case is about large downtown businessmen's clubs which style themselves "private" and thereby claim for themselves a constitutional right to discriminate against women and minorities. According to these clubs, the Constitution guarantees them the right to deny membership to women and minorities, shunt those attending professional and business meetings (as guests) into side corridors and back elevators, bar them from lounges and dining rooms, and otherwise treat them as inferior beings. The claimed right to practice this invidious discrimination is so strong, say the clubs, that this Court must nullify New York City's attempt—in Local Law 63—to prevent this discrimination.¹

1. The clubs' claimed constitutional right would permit them to discriminate equally against women, minorities, and ethnic groups. As will appear below, however, most of the recent discussion and study of this issue deals with discrimination against women. It seems that many members of exclusionary clubs who would be embarrassed to admit that they engage in discriminatory

The clubs base their extraordinary claim entirely on their assertion—unsupported by anything in the record before this Court—that they are “private.” But Local Law 63 does not cover clubs which are “private” in any constitutionally meaningful sense of that word. The Law covers only those clubs which, both individually and collectively, have an important impact on the economic life of the City. By excluding women and minorities, these clubs effectively limit opportunities for advancement, especially in the businesses and professions which contribute so much to New York City’s economic vitality—banking, financing, journalism, publishing, accounting, real estate development, law, and the management of many of the nation’s significant corporations.

A. History of Local Law 63

Prior to the enactment of Local Law 63, the laws of New York City and State had prohibited invidious discrimination in places of public accommodation. See N.Y. Exec. Law § 292, 296 (McKinney 1982; N.Y.C. Admin Code, tit. 8 §§ 8-102(9), 8-107 (1986); see also A6a.² Both laws, however, had excluded from their coverage places that are “distinctly private.”³ This exemption permitted a claim by large downtown men’s clubs that they could continue to exclude women, even though a not insubstantial part of the activities at the clubs related to the business lives of the members (and the City). Local Law 63 amended the City Administrative Code to provide criteria for determining whether a place of accommodation is “distinctly private” and brought

practices against minorities are ready to admit—indeed they proudly proclaim—that they discriminate against women.

2. Numbers preceded by the letter “A” refer to pages in the Appendix to Appellant’s Jurisdictional Statement. Numbers preceded by the letters “JA” refer to pages in the Joint Appendix.

3. By exempting from the reach of the State and City Human Rights’ laws places that are not just “private,” but “distinctly” private, the legislatures intended a narrower exemption than that which exists in the federal civil rights statute (A8a-A9a). The more permissive federal law excludes from its purview a “private club or other establishment not in fact open to the public.” 42 U.S.C. § 2000a(c) (1982).

within the anti-discrimination provision these large all-male clubs.

The clubs covered by Local Law 63 are places where men regularly gather to dine or drink with other male business associates to discuss business, to conduct business meetings or to socialize for business purposes. These clubs provide entry into what is popularly known as the “Old Boy Network.”⁴ The exclusion of women has greatly hampered their ability to meet with other professionals and has limited the opportunity for lateral mobility or upward advancement.⁵ The humiliation experienced by women who have either been barred from membership or barred from entering these clubs, or have been permitted to enter but have been segregated into separate dining rooms, reinforces the anachronistic stereotype of inferiority which this Court has condemned. *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984) (“*Roberts*”).

The City Council passed Local Law 63 only after careful hearings which focused on the extent to which these clubs are business-oriented and the effect on women of their exclusion from these clubs. In addition, the Council drew upon the growing number of studies and personal testimonials which had in the past decade begun to document the serious effect upon women of their exclusion from these clubs. For example, in November 1973, the New York City Commission on Human Rights held hearings investigating the existence and effect of discrimination against women in so-called “private clubs.”⁶ Nineteen witnesses testified

4. See Burns, *The Exclusion of Women from Influential Men’s Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 Harv. C.R.-C.L. L. Rev. 321 (1983); Schafran, *Welcome to the Club! (no women need apply)*, Women and Foundations/Corporate Philanthropy (1981); *The All-Male Club: Threatened On All Sides*, Bus. Wk., August 11, 1980, at 90.

5. Burns, *supra* at 328 & n.20 (quoting R. Powell, *The Social Milieu as a Force in Executive Promotion* 105 (1969)).

6. See E. Lynton, *Behind Closed Doors: Discrimination by Private Clubs* (May 1975) (based on hearings held before the New York City Commission on Human Rights in November, 1973) (“*Behind Closed Doors*”). Excerpts of the report were provided to the City Council in 1983. See Hearings Before the Committee on General Welfare, New York City Council, December 22, 1983 (“*Hearings*”), written testimony of Jack Greenberg, Director-Counsel,

at that hearing. Club executives testified to the crucial importance of club membership to careers, and women testified to instances of exclusion and embarrassment.

In 1983, testimony before the City Council confirmed earlier findings and brought to light new examples of the impact of exclusion. The testimony indicated that club membership can be an important catalyst in a person's career, especially for those in the professions and service industries so important to New York's economy. As Judge, then-professor, Ruth Bader Ginsburg of the United States Court of Appeals for the District of Columbia Circuit explained, these clubs are "settings where individuals seeking career-building opportunities can display their talents and may be helped on their way."⁷ The Bureau of Labor Statistics revealed that almost one-third of males get their jobs through personal contacts, and that figure is almost certainly higher for high-level jobs.⁸ Even if women get hired for low- or middle-level jobs without club membership, they will not "get into the corner offices where the real power is centered" unless they have access to the full breadth of the business world, including the clubs.⁹ For example, all the best opportunities for librarians are funneled through the Grolier Club which was until recently all-male.¹⁰

NAACP Legal Defense and Education Fund, Inc. (Appendix) ("Greenberg Appendix"), § IV (4). This testimony is a matter of public record.

7. Ginsburg, *Women as Full Members of the Club: An Evolving American Ideal*, 6 Human Rights 1, 19 (1977) (quoted in Hearings, *supra*, written testimony of Janet Studley, Chair, American Bar Association Committee on First Amendment Rights, attachment at 3).

8. Hearings, *supra*, written testimony of Judith I. Avner, NOW Legal Defense and Education Fund, at 3.

9. *Id.* at 66, oral testimony of Jo-Ann Whitehorn, for herself as a private real estate attorney and for the American Jewish Congress. See also *id.* at 9, 11, oral testimony of Liz Abzug, Deputy Commissioner, State Division of Human Rights; *id.* at 17, oral testimony of Janet Studley; *id.* written testimony of Carol Lister, New York Director, Anti-Defamation League of B'nai B'rith, at 3. Indeed, women have yet to get into those corner offices; only two percent of the top executives surveyed in 1985 were women. Hymowitz & Schellhardt, *The Glass Ceiling*, Wall St. J., Mar. 24, 1986, at 10, c. 1.

10. *Behind Closed Doors*, *supra*, at 20 (quoted in Greenberg Appendix, *supra*, § IV(4)).

Club membership also provides helpful business contacts throughout one's career. As Andrew Stein, City Council President, put it: "Business is transacted over lunch in the clubhouse dining room. Contacts and deals are made in the relative quiet of the clubhouse bar."¹¹ Even Milton Meyer, Chairman of the Conference of Private Organizations who testified against Local Law 63, admitted that business is "carried out" at clubs.¹² Jack Greenberg, Director-Counsel of the NAACP Legal Defense and Educational Fund, stated that he went to meetings at these clubs perhaps once a month for almost 30 years and only two were social; all the rest were related to business.¹³ Some clubs host such important business meetings that they are reported by the press, such as a meeting between the Chairman of the Hyatt Corporation and Braniff creditors concerning a \$35 million dollar investment,¹⁴ or monthly meetings of the Tax Forum, made up of the senior tax partners of the most prominent law firms in New York City.¹⁵

When women are denied membership in these clubs, they are denied the opportunity to make important business contacts or to attend meetings necessary for the development of their careers. Carol Lister, the New York Director of the Anti-Defamation League of B'nai B'rith, was barred from attending a briefing by a top White House official at a male-only club.¹⁶ Karen Kessler, the New York Executive Director of the Democratic National Committee, could not attend a meeting of the New York Public Affairs Professionals at the all-male Union League Club.¹⁷ Margaret Boepple, Vice Chancellor of the City University of New

11. Hearings, *supra*, at 24, oral testimony. See also Burns, *supra*, 18 Harv. C.R.-C.L. L. Rev. at 329; *The All-Male Club: Threatened On All Sides*, Bus. Wk., Aug. 11, 1980, at 90.

12. Hearings, *supra*, at 45, oral testimony.

13. *Id.* written testimony, at 5-6.

14. N.Y. Times, April 16, 1983, at A29, c.3.

15. N.Y.L. Jour., June 20, 1983, at 1, c. 2.

16. Hearings, *supra*, at 74, oral testimony. (She was later admitted after several male colleagues forcibly restrained the doorman from barring her.)

17. *Id.* written testimony of Lynn Hecht Schafran, Special Counsel, New York City Commission on the Status of Women, at 5.

York, was unable to attend a meeting at an Albany men's club when she was the City's chief lobbyist.¹⁸ Women have been barred from industry meetings and excluded from training programs held at these clubs by Wall Street professionals.¹⁹ When a woman member of the executive committee of the Republican Party Caucus objected to its meetings at the all-male Century Association, "she was given the choice of shutting up or dropping out."²⁰ As Cyril Brickfield, then-President of the National Club Association concluded in 1973, "[i]t is oftentimes vital to belong [to a club] to become an executive. To the extent you are excluded, you are disadvantaged."²¹

Sometimes meetings are relocated so that women can attend, but it is awkward and humiliating for women to have to express their concern, persuade the organizer to change the location of the meetings, arrange for a new location, and notify the participants.²² When meetings that include women as guests are held at a club that discriminates, they are often convened in second-string dining and meeting rooms with less elegant service.²³ Women attending these professional business meetings are directed into side corridors and back elevators.²⁴

The City Council had before it studies showing that businesses understand just how powerful is this world of the "private" club.

18. *Id.* at 8, oral testimony.

19. Schafran, *Private Clubs, Women Need Not Apply*, Foundation News (Jan/Feb. 1982) (quoted in Greenberg Appendix, *supra*, § VI(1)).

20. Hearings, *supra*, written testimony of Lynn Hecht Schafran, at 4.

21. *Id.*, written testimony of Isaiah Robinson, Jr., Chairman, New York City Commission on Human Rights, at 2.

22. *Id.* at 8, oral testimony of Margaret Boepple; *id.* at 33, oral testimony of Lynn Hecht Schafran.

23. *Id.* at 75, oral testimony of Carol Lister; *id.*, written testimony of Lynn Hecht Schafran, at 8.

24. *Behind Closed Doors*, *supra*, at 18-19; Crain's N.Y. Bus., Oct. 19, 1987, at 4, c. 1 (women guests at one club required to use elevator rather than stairs; another club has no women's bathroom; women excluded from main dining room at several other clubs).

The National Club Association estimated that 37% of its members' dues are paid directly by businesses.²⁵ A survey of 701 banks conducted by the Senate Committee on Banking, Housing and Urban Affairs showed that 60% of those banks regularly pay membership dues in private clubs and organizations for their employees.²⁶ A *New York Times* survey of 400 major corporations found that more than half provided club membership for their executives.²⁷

Testimony before the Council confirmed these studies. Martin Whitman, the president of a New York securities firm, stated that he used the clubs "almost solely for business meetings."²⁸ Robert Abrams, New York State Attorney General, informed the Council that many major companies require membership in such clubs.²⁹ In 1980, the then-president of the University Club wrote to its members that a:

recent analysis of dues and expense payments showed that nearly 40% of receipts were paid by checks drawn on business accounts; this is only a part of the total, since many persons pay on their own account and then obtain reimbursement from employers. It may be assumed conservatively that employers are the source of well over 50% of our dues and fees.³⁰

On the other hand, businesses rarely pay the dues for membership in women's clubs.³¹

Even the government has long recognized the business value of club activities and has allowed membership fees and expenses to be deducted as a business expense. See 26 U.S.C. § 162(a)

25. See Hearings, *supra*, written testimony of Janet Studley, attachment at 4.

26. 45 Fed. Reg. 4954, 4955 (January 22, 1980) (contained in Greenberg Appendix, *supra*, §§ II(1); III(1)).

27. Hearings, *supra*, written testimony of Carol Bellamy, former City Council President, at 2.

28. *Id.*, written testimony. See also *id.*, written testimony of Jack Greenberg, at 5-6; *id.*, written testimony of Ruth Marcus, at 1.

29. *Id.*, written testimony, at 6.

30. Letter from J. Wilson Newman to the membership of the University Club (March 31, 1980) (contained in Greenberg Appendix, *supra*, § V[2]).

31. *Behind Closed Doors*, *supra*, at 24.

(1982). As the City Council heard, the public is actually subsidizing discrimination at clubs because of these deductions.³²

B. Legislative Findings

Based on these extensive materials, the City Council made legislative findings that are fully supported—indeed they were compelled—by the record before it. The Council found that the clubs' discriminatory practices did in fact impede the economic opportunity for women and minorities (JA 15):

One barrier to the advancement of women and minorities in the business and professional life of the city is the discriminatory practices of certain membership organizations where business deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed.

Although some of these clubs might "avowedly be organized for social, cultural, civic or educational purposes," the Council could not ignore "the commercial nature of some of the activities occurring therein and the prejudicial impact of these activities on business, professional and employment opportunities of minorities and women" (JA 15). Specifically, the Council found that business activities often occur at the larger clubs which provide regular meal service (JA 15):

business activity often occurs at clubs having more than four hundred members which provide regular meal service allowing persons to discuss business. The dues and expenses of members at such organizations are often paid by their employers, because the employee's activities at the organization help to develop the employer's business. The organizations also rent their facilities through members for use as conference rooms for business meetings attended by nonmembers. Organizations where such practices occur provide benefits to business entities and persons other than members and thus are not in fact "distinctly private" in their nature.

³² Hearings, *supra*, written testimony of Lynn Hecht Schafran, at 2; *id.*, written testimony of Judith I. Avner, at 4.

Finally the Council recognized that these clubs might perform valuable service to the community and that there was a legitimate interest in private association asserted by club members. Therefore the Council stated its intention that the regulation of the clubs be as narrow as possible to eliminate the invidious discrimination (JA 16):

It is not the Council's purpose to dictate the manner in which certain private clubs conduct their activities or select their members, except insofar as is necessary to ensure that clubs do not automatically exclude persons from consideration for membership or enjoyment of club accommodations and facilities and the advantages and privileges of membership, on account of invidious discrimination. Nor is it the Council's purpose to interfere in club activities or subject club operations to scrutiny beyond what is necessary in good faith to enforce the human rights law.

C. Local Law 63

Local Law 63 provides, in pertinent part, as follows (JA 17):

An institution, club or place of accommodation shall not be considered in its nature distinctly private if it [1] has more than four hundred members, [2] provides regular meal service and [3] regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business.

In enacting the law, the Council struck a sensitive balance between providing equal access to the economic and professional opportunities provided in many clubs and the interests asserted by club members. The legislation does not cover all so-called "private" clubs. There are several significant limitations. First, the law applies only to those clubs which can legitimately be termed "large," so that claims of intimacy would not be very plausible. In fact, the number 400 was chosen after this Court's decision in *Roberts*, which characterized as "large" two local chapters of the Jaycees with 430 and 400 members, 468 U.S. at 621, and held

that they could be required to admit women in the face of claims of privacy and freedom to associate.³³

Second, not all large clubs are covered. Local Law 63 applies only to those large clubs which "provide[] regular meal service." The Council had found, based on very substantial evidence, "that business activity often occurs at clubs having more than four hundred members which provide regular meal service allowing persons to discuss business" (JA 15).

Third, not even all large clubs which provide regular meal service are covered. These clubs must also "regularly receive[] payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business."

Fourth, the Council legislated only in those areas where the legislation could be supported by substantial factual material. Because there was a paucity of factual material concerning benevolent orders and religious corporations, these associations were exempted from the Law. The Council invited and received extensive materials from both proponents and opponents of Local Law 63. Although the issue of benevolent orders and religious corporations was raised, the City Council heard only conclusory statements as to their similarity to the large downtown men's clubs sought to be regulated by Local Law 63.³⁴ Nor was any benevolent order or religious corporation identified which met the statute's criteria. The City Council was thus not presented with any facts from which to conclude that those organizations are, in fact, similar to the large downtown men's clubs or that religious or fraternal associations had a similar negative economic impact upon women and minorities in the City.³⁵ "Because small clubs,

33. See Hearings Before the Committee on General Welfare, New York City Council, Sept. 10, 1984, at 8 (adopting amendments to Introductory 513-A, which were incorporated into Local Law 63) ("1984 Hearings") (statement of Councilman Thomas J. Manton).

34. Hearings, *supra*, vol. 2 at 24, 59, oral testimony of Albert Blumenthal, Assemblyman; *id.* at 82, 88, oral testimony of Laura Blackburne, Counsel, New York State NAACP.

35. See 1984 Hearings, *supra*, at 6-7 (Statement of Councilman Thomas J. Manton).

benevolent orders and religious corporations have not been identified in testimony before the Council as places where business is prevalent, the Council has determined not to apply the law to such organizations" (JA 15).

Taken together, the three requirements of Local Law 63 were very responsive to legitimate associational concerns expressed at the hearings. To be covered, a club must be large; it must provide, on a regular basis, the opportunity to do business over meals; and it must in fact regularly accept money on behalf of nonmembers for business purposes. In these circumstances, it is quite unlikely that such a club could legitimately claim either that it was a very intimate association or that its predominant purpose was to express views and that it did not have a substantial business component. Indeed the Law itself provides a ready way for a club to remove itself from Local Law 63's presumption without compromising the alleged "private" social nature of the club. The club can simply stop accepting money on behalf of nonmembers for business purposes.

Finally, and contrary to the claims made throughout appellant's brief, Local Law 63 does not create what appellant calls an "irrebuttable presumption." It does create a very strong presumption that if a club satisfies the three criteria, it "will be deemed to have lost the essential characteristic of selectivity and instead have become 'affected with a public interest.'" *New York State Club Association v. City of New York*, 69 N.Y.2d 211, 221, 513 N.Y.S.2d 349, 354, 505 N.E.2d 915, 919 (1986) (A9a). But a club may still argue, and adduce proof, before the City Commission on Human Rights ("Commission") or a court that because of the club's particular attributes it is entitled to constitutional protection in spite of its meeting the three-part test of Local Law 63.

D. Enforcement of Local Law 63

Appellant attacks Local Law 63 on its face and presents to this Court hypothetical accounts of how the Law might be applied and how it might affect many unnamed and undescribed clubs.

In fact, under the City Human Rights Law there can be no enforcement or sanctions against any particular club without that club first having the opportunity to test the applicability of the statute and any defenses, constitutional or otherwise, in lengthy administrative or judicial proceedings. There have been only four such proceedings commenced since the passage of Local Law 63. They give a more realistic picture of how the City's Human Rights Commission will apply the Law than does appellant's conjecture.

1. *Procedure under the City's Human Rights Law.* A proceeding before the Commission begins with a complaint, either by an individual or by the Commission's staff. N.Y.C. Admin. Code, tit. 8, § 8-109(1) (1986). Thereafter, the Commission investigates and determines whether probable cause exists. *Id.* § 8-109(2). The Commission may not require the production of names from a general membership list of any association. *Id.* § 8-105(5). If a probable cause determination is made, the Commission may attempt to settle the matter, but if a conciliation agreement is not reached, the organization charged is entitled to a formal hearing. *Id.* § 8-109(2)(a), (b). At the hearing, the organization charged may be represented by counsel and present evidence. *Id.* § 8-109(2)(b). The Commission will consider constitutional defenses to the application of the anti-discrimination law. See, e.g., *Cruz v. Blecher*, No. 016585 (N.Y.C. Comm. on Hum. Rgts, Feb. 3, 1987) (considering constitutional defense to discrimination charge under different statute); *American Comm. on Africa, v. The New York Times*, No. 5787-PA (N.Y.C. Comm. on Hum. Rgts, July 19, 1974) (same), *vacated on other grounds sub nom., The New York Times Co. v. City of New York Commission on Human Rights*, 79 Misc. 2d 1046, 362 N.Y.S.2d 321, (Sup. Ct., N.Y. Co. 1974), *aff'd*, 49 A.D.2d 851, 374 N.Y.S.2d 9 (1st Dept., 1975) (per curiam), *aff'd*, 41 N.Y.2d 345, 393 N.Y.S.2d 312, 361 N.E.2d 963 (1977); see also *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619, ___, 106 S. Ct. 2718, 2724 (1986).

If, after the hearing, the Commission makes a finding of an unlawful discriminatory practice, it may issue, among other things, a cease and desist order or an affirmative order requiring "the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons" and the evaluation of "applications for membership in a club that is not distinctly private without discrimination based on race, creed, color, national origin or sex." N.Y.C. Admin. Code, tit. 8, § 8-109(2)(c). Any aggrieved organization may obtain judicial review of the Commission's findings. *Id.* § 8-110.

Only if an organization "wilfully" violates an order of the Commission may the violator be charged with a misdemeanor and, if found guilty, have criminal sanctions imposed against it. *Id.* § 8-111. Pursuing judicial review of a Commission order is specifically deemed to be not "wilful." *Id.* Thus, an organization is not subject to any criminal penalties before the validity of the order has been judicially resolved. Also, no club can be forced, under threat of penalty, to change its practices without a prior judicial determination of the Law's applicability and the club's defenses.

2. *The four proceedings under Local Law 63.* The Commission's staff has instituted proceedings against four large all-male clubs—the New York Athletic Club (10,003 members), The University Club (4,329 members), the Century Association (1,900 members), and The Union League Club (1,600 members).³⁶ Even the smallest has four times the minimum number

36. N.Y.C. Comm. on Human Rights Complaints Nos. EM00312031987DN (Mar. 19, 1987); 013026028-PA (Jan. 30, 1986); 013026026-PA (Jan. 30, 1986); 013026027-PA (Jan. 30, 1986).

The Commission issued a finding of probable cause against the New York Athletic Club on December 10, 1987. The University Club voted to admit women in June, 1987 and the Commission proceeding against it has been discontinued. In August, 1986 the Century Association entered into a settlement with the Commission to the effect that it would admit women if Local Law 63 were upheld. The Commission issued a finding of probable cause against The Union League Club on July 8, 1987. The Union League Club has sued in federal district court to enjoin the Commission's proceedings and the court dismissed that suit. *The University Club and The Union League Club v. The City of New York*, 86 Civ. 2330 (GLG) (S.D.N.Y. Mar. 17, 1987). The Union

of members required by Local Law 63. According to the complaints, all have regular meal service. All receive large amounts of income from nonmembers in furtherance of nonmembers' trade or business. As noted above, in 1980 the University Club estimated that 50% of dues and fees derive from nonmembers. In 1986, members of the club estimated that it received \$1.7 million per year from or behalf of nonmembers.³⁷ The Century Association estimated that it would cost over \$150,000 a year for the club to "go private."³⁸ The New York Athletic Club encourages its members to use the club for business and chides them for not doing so even more often. In its newsletter, it writes to members: "many members are simply not using facilities that are critical to the club's stability and financial health. . . . Try to use the club at least once every month for a business lunch or dinner." Similarly, the club notes: "[m]any of your fellow members sponsor their business outings at Travers Island [a club facility] year after year."³⁹ All four clubs host a large number of important public events and business meetings, such as a testimonial dinner for the former Prime Minister of Ireland, a meeting between the New York Mets and the Montreal Expos involving the trade of Gary Carter, a meeting for chancellors of state and city universities, monthly dinner meetings of prominent trust and estates lawyers, or lunch meetings of the Association of Radio-Television New Analysts.⁴⁰

League Club's appeal to the United States Court of Appeals for the Second Circuit will be argued on January 14, 1988 (Nos. 87-7212, 7273).

37. Letter from Committee of 1000 to Members of The University Club, April 16, 1987.

38. N.Y. Times, Aug. 22, 1987, at 1, c.3.

39. *The Winged Foot*, Aug. 1984 at 19; Aug. 1985 at 37.

40. See Comm. on Hum. Rgts, Complaint No. EM00312031987DN, ¶ 5(b) (March 19, 1987) (New York Athletic Club); N.Y. Times, Dec. 12, 1984, at B9, c.1; N.Y. Times, Jan. 20, 1983, at B3, c.2; Comm. on Hum. Rgts, Complaint No. 013026028-PA, ¶ 5(b) (Jan. 30, 1986) (University Club); Comm. on Hum. Rgts, Complaint No. 013026026-PA, ¶ 5(i) (Jan. 30, 1986) (Century Ass'n) respectively.

See also, e.g., N.Y. Times, Feb. 15, 1985, at D3, c.5 (meeting between Carl Icahn and 150 Wall Street professionals at University Club); *id.* April 25, 1985, at A10, c.1 (reception for John Cardinal O'Connor at University Club); *id.*

E. The Parties

Appellant New York State Club Association, Inc. is a not-for-profit association in the State of New York. It is comprised not of individuals, but of private clubs and associations (JA 10, JA 32). Appellant's Certificate of Incorporation states that (JA 38):

The purpose for which this association is formed is to promote the common business interests of its Members, consisting of social clubs, golf clubs, tennis clubs, yacht clubs, and other private clubs of the State of New York engaged in the operation of club facilities for the benefit of their respective membership

Appellant has asserted in these proceedings that the facilities of its members "are available solely to club members and *bona fide* guests . . . and . . . are not directed at the public at large" (App. Br. at 4-5); that its member clubs "have highly selective membership practices" (*id.* at 25); and that they "may well exist primarily for purposes of espousing unpopular ethnic, racial or gender related positions" (*id.* at 34).

These assertions are without support in the record before this Court. Indeed, the record contains almost no information about appellant's member clubs—such as who they are; how many of them are in New York City; how large they are; what their

May 7, 1984, at B7, c.2 (benefit dinner for the Museum of Modern Art at University Club); *id.* Nov. 11, 1985, at A18, c.6 (forum on apartheid by Manhattan Institute for Policy Research at University Club); *id.* Oct. 25, 1984, at B1, c.1 (reception for Atheneum Publishers at Century Association); *id.* Nov. 16, 1984, at C32, c.1 (meeting of 1984 American Book Awards non-fiction panel at Century Association); *id.* Feb. 22, 1982, at D11, c.3 (marketing seminar by Rodale Press Bicycling Magazine at New York Athletic Club); *id.* June 27, 1985, at A1, c.2 (meeting between Hotel Ass'n and Hotel and Restaurant Workers Union at New York Athletic Club); *id.* Apr. 3, 1983, § 1, at 40, c.3 (benefit supper for New York Pops at New York Athletic Club); *id.* Mar. 25, 1981, at C6, c.1 (convention of Association des Maitres Cuisiniers de France at New York Athletic Club); *id.* Nov. 10, 1985, § 10, at 4, c.5 (dinner for astronaut Sally Ride at Union League Club); *id.* Jan. 10, 1985, at A10, c.2 (luncheon for CIA Director Casey at Union League Club); *id.* Jan. 21, 1983, at B6, c.3 (fashion show for 400 at Union League Club); *id.* Dec. 29, 1985, § 1, at 33, c.1 (reception for President of Local Initiatives Support Corporation at Union League Club).

selection procedures and practices are; which ones, if any, claim to be associations of intimates; which ones, if any, are organized for the purpose of espousing views; and whether, and if so how much, business-related activity is conducted at the clubs. The emptiness of the record is attributable to appellant's adamant refusal to supply any of this information. In the proceedings below, appellant refused to respond to appellees' interrogatories requesting, among other things, the names of its member clubs, the selection process at its member clubs, or the by-laws of its member clubs which might reveal the clubs' purposes and activities. See JA 47, n.*; Plaintiff's Answer to Interrogatories Nos. 2(a), 3(n), and 3(d).

Appellees are The City of New York, the Mayor of The City of New York, The New York City Human Rights Commission and its members.

F. Proceedings Below

The day after the Mayor signed the bill into law, appellant commenced this action seeking a declaration that the law is inconsistent with the State Human Rights Law and is unconstitutional on its face and as applied (JA 9-13). Appellant also sought to enjoin enforcement of the Law (JA 13). In its answer, appellees asserted, *inter alia*, that appellant lacks standing to prosecute this action and that Local Law 63 is constitutional and not preempted by State law (JA 24-25).

Appellant sought preliminary relief to enjoin the Law's enforcement. The New York Supreme Court denied this relief and the Appellate Division affirmed (JA 44-46). The Supreme Court then granted summary judgment for appellees. The court found that appellant had standing, but that Local Law 63 was "constitutional and valid" (A25a-40a). The Appellate Division again affirmed (A16a-22a).

On February 17, 1987, the New York State Court of Appeals affirmed the grant of summary judgment in favor of appellees. Referring to the "extensive findings of the City Council . . . that

business activity pervades clubs which have more than 400 members and regularly provide meals during which business is conducted," the Court unanimously sustained the constitutionality and validity of Local Law 63 (A2a-13a). In holding that Local Law 63 did not violate appellant's member clubs' rights to privacy, free speech and free association, the Court followed this Court's analysis in *Roberts*. The Court stated (A11a, quoting *Roberts*, 468 U.S. at 620-621):

The definition read into the City Human Rights Law under *Power Squadrons* of "distinctly private" and the three-prong test set forth in Local Law No. 63 itself, together adequately assess "objective characteristics" of the organizations at issue, including criteria such as their "size, purpose, policies, selectivity, congeniality, and other characteristics that in [this] particular case [are] . . . pertinent." . . . [T]he law in effect deems a club that is large and where "much of the activity central to the . . . maintenance of the association involves the participation of strangers to that relationship" to have lost any claimed protection of intimate association (citations omitted).

In the course of its opinion, the Court of Appeals indicated that the three-part test of the local law was not exclusive but that the three criteria were, rather, "permissive factors" (A11a). That is, in appropriate cases other factors could be considered by the City Commission on Human Rights or a court in deciding whether a club is covered by the City Human Rights Law. In an earlier decision, the Court of Appeals had construed the State Human Rights Law's exemption for clubs that are "distinctly private" by setting out five factors that "may" be considered in making the determination. *United States Power Squadrons v. State Human Rights Appeal Board*, 59 N.Y.2d 401, 412, 465 N.Y.S.2d 871, 876, 452 N.E.2d 1199, 1204 (1983).⁴¹ In its

41. Those factors are "whether the club (1) has permanent machinery established to carefully screen applicants on any basis or no basis at all, i.e., membership is determined by subjective, not objective factors; (2) limits the use of the facilities and the services of the organization to members and bona fide guests of members; (3) is controlled by the membership; (4) is nonprofit and operated solely for the benefit and pleasure of the members; and (5) directs its

opinion in this case, the Court said that "Local Law No. 63 does not prohibit the City fact finder from considering the test of selectivity, or, indeed, any of the *Power Squadrons* factors" (A9a).

Thus contrary to appellant's repeated assertions in its brief, the New York Court of Appeals did not construe Local Law 63 as embodying the "irrebuttable presumption" imagined by appellant. Indeed, appellant recognizes that the Court of Appeals said that the criteria set forth in Local Law 63 were "permissive" (App. Br. at 23, n. 11). Appellant then makes the extraordinary assertion that the New York Court of Appeals "erred" in its interpretation of New York law. *Id.* Appellant apparently wants this Court to reject what the New York Court of Appeals said about New York law and reinterpret the New York statute so it more neatly fits into appellant's argument that the statute is invalid. *But see, e.g., New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982).

SUMMARY OF ARGUMENT

In 1983, New York's City Council conducted extensive hearings to study the effect upon women and minorities of their exclusion from so-called "private" clubs. The Council found that in the large downtown men's clubs, a substantial amount of commercial activity occurred and that the exclusion of women and minorities had a serious and negative effect on the professional and business lives of the excluded groups (and therefore upon the City as well). The Council passed a law (Local Law 63) prohibiting these large clubs from continuing their invidious discrimination. The Council did so, however, in a restrained way. Not all clubs were covered but only those which, according to the extensive evidence before the Council, were likely to have a substantial commercial component and therefore were likely to present the evil which the Council wanted to ameliorate. In addition, the

publicity exclusively and only to members for their information and guidance" (A8a).

Law does not purport to change any of the clubs' practices or admission procedures except their invidious discrimination.

Appellant's attack on Local Law 63 is phrased in several ways but comes down to the claim that the Law is overly broad and therefore unconstitutional on its face. The Court should not entertain this claim. Appellant is asserting the alleged rights of association of individual club members. Yet appellant lacks standing to do so because it is an association of clubs and not of the individuals whose alleged rights are asserted here. In addition, appellants have refused to supply any significant information about its member clubs. Because of this refusal, the Court does not have before it concrete facts upon which to judge the validity of appellant's constitutional claims.

In any event, the Law is constitutional on its face. In order to prevail on its facial attack, appellant must show that a substantial amount of constitutionally-protected activity is covered by the Law. In fact, the opposite is true. The criteria set forth in the Law are directly responsive to the constitutional concerns articulated by this Court in *Roberts* and recently reaffirmed in *Board of Directors of Rotary International v. Rotary Club of Duarte*, __U.S.__, 107 S. Ct. 1940 (1987) ("*Rotary*"). Therefore, any club that meets these criteria is extremely unlikely to have a plausible claim for constitutional protection. In addition, contrary to appellant's repeated assertion, Local Law 63 does not create what appellant calls an "irrebuttable presumption." New York law provides ample opportunity, both in administrative and judicial proceedings, for any club to attempt to demonstrate that it is entitled to constitutional protection and therefore should be exempted from the coverage of the City Human Rights Law, even though the club meets the criteria of Local Law 63.

Finally, appellant attacks the exemption in Local Law 63 for religious corporations and benevolent orders as a violation of the Equal Protection Clause. This exemption, however, was based on the City Council's study of extensive materials which did not indicate that the excluded organizations presented the same evil as did the clubs covered by the Law. Although the question of

religious and benevolent organizations was raised at the hearings, there was no concrete evidence showing that they had a large commercial component or that any exclusionary practices had a substantial negative affect upon the economic or professional lives of women or minorities. It was rational, indeed prudent, for the Council to pass legislation covering the large downtown clubs (which clearly presented the evil to be ameliorated), and leave for another day the possibility of covering other kinds of associations if and when a showing was made that these other associations presented a similar evil.

POINT I

APPELLANT LACKS STANDING BECAUSE IT IS AN ASSOCIATION OF CLUBS AND NOT OF THE INDIVIDUALS WHOSE ALLEGED RIGHTS ARE BEING ASSERTED.⁴²

Appellant is an association of 125 clubs in New York State. On its own behalf and as a representative of its member clubs, appellant asserts a deprivation of its and their First Amendment rights (JA 11; see also App. Br. at 7, 8-10, 18-20, 32-35). But the arguments raised by appellant here and in the courts below do not concern appellant's own alleged First Amendment rights or even those of its member clubs. At issue here are the alleged rights of individuals to associate with each other. Appellant, however, is not an individual; it is an association of clubs which, in turn, are made up of individuals. In other words, appellant is twice removed from any individual and is attempting to assert the constitutional rights of these individuals, who are not themselves members of the appellant.

42. In their answer, appellees assert that appellant had no standing to litigate this action (JA 24-25). The New York Supreme Court disagreed (A26a) and the New York appellate courts did not address the issue. Since the resolution of the standing question is determinative of this Court's subject matter jurisdiction as governed by Article III of the Constitution, this Court should address the issue. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 260 (1977) (citing *Jenkins v. McKeithen*, 395 U.S. 411, 421 [1969] [plurality opinion]).

Appellant's arguments are abstract largely because appellant is so far removed from the individuals whose alleged rights are at issue. Appellant makes claims about how Local Law 63 could or might infringe upon some hypothetical individual club member's First Amendment rights. However, there are no facts alleged from which any court can ascertain whether any real person's intimate or expressive associational relationships are being curtailed. These vague claims lack the requisite concreteness mandated by Article III of the Constitution.

No case has ever held that an organization may vicariously assert the rights of individuals twice removed. Indeed the most relevant case is to the contrary. *Rotary* involved a California statute, similar to the one at issue here, which prohibited the exclusion of women in clubs like the Rotary. The local chapter in Duarte complied with the statute and admitted women. Rotary International, which barred women, revoked Duarte's charter. Duarte sued to enjoin the revocation. International claimed that the California statute, under which Duarte had acted, violated the constitutional right of free association. Duarte urged, however, that International's arguments should not be entertained because International, which was made up only of local clubs and not of individuals, did not possess a sufficient interest in the asserted rights of association. See Brief for Appellees at 22-24, 29-65, *Rotary*. The Court accepted Duarte's argument (107 S. Ct. at 1945 n. 4):

[Rotary] International, an association of thousands of local Rotary Clubs, can claim no constitutionally protected right of private association. Moreover, its expressive activities are quite limited.

The Court went on to consider the merits of the case only because Duarte, the association of individuals, was a party.

The principle followed by this Court in *Rotary* is, in effect, one of standing and reaffirms prior holdings of this Court. See *International Union, United Automobile Aerospace and Agricultural Implement Workers of America v. Brock*, 477 U.S. 274, 106 S. Ct. 2543, 2528-29 (1986); *Hunt v. Washington State Apple*

Advertising Commission, 432 U.S. 333, 342 (1977); *Worth v. Seldin*, 422 U.S. 490, 511 (1975). An association may sue in its own right or as a representative of its members. *Worth*, 422 U.S. at 511. However, to meet the case-or-controversy requirement of Article III of the Constitution, an association, when suing as a representative of its members, must allege (1) "that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit;" *Id.*, (2) "the interests it seeks to protect are germane to the organization's purpose;" and (3) "neither the claim asserted nor the relief requested requires the participation of individual members to the lawsuit." *Hunt*, 432 U.S. at 343. Appellant has failed to satisfy the first part of this test because it has not established that it or any of its member clubs have suffered any deprivation of their own First Amendment rights.

There is no reason for this Court to expand the rule of standing in this case. This is not a situation in which member clubs are unlikely to sue on behalf of their individual members out of fear of reprisal or lack of funding or because they lack expertise about material legal issues. See *International Union*, 477 U.S. at ___, 106 S. Ct. at 2532-33 (union with expertise and funding); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459-60 (1958) (civil rights organization with expertise and funding and acting as a shield for reprisal against individual members). In fact, two of appellant's member clubs, The University Club and The Union League Club, have sued in federal court in their own names to enjoin enforcement of Local Law 63 against them and have raised arguments identical to those asserted by appellant here. *The University Club and The Union League Club v. The City of New York*, 86 Civ. 2343 (GLG) (S.D.N.Y. Mar. 17, 1987), *app. pending*, Nos. 87-7312, 7372 (2d Cir.) (argument calendared for January 14, 1988).

The most appropriate way to test appellant's argument that Local Law 63 is overly broad is in lawsuits involving individual clubs. In such lawsuits, the court can determine whether the

statute reaches clubs or types of clubs which should be constitutionally protected. These would be real cases and would avoid appellant's tactic of making hypothetical assertions and then refusing to supply facts about individual clubs which could verify—or refute—the assertions. See *supra*, pp. 15-16. Appellant attempts vainly to put some substance into its abstractions by claiming that all its 125 clubs are "selective." However, because appellant has refused to provide details, there is no way to judge whether any of appellant's clubs are "selective" in any constitutionally meaningful sense. This Court should decline appellant's invitation to decide the issues presented here "in the rarified atmosphere of a debating society." See *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

Finally, no one is harmed by not deciding this question now. No club is subject to sanctions without first having an opportunity to test the applicability of the statute and assert any constitutional or other defenses in administrative and judicial proceedings.

POINT II

LOCAL LAW 63 IS CONSTITUTIONAL ON ITS FACE AND IS NOT OVERBROAD.

A. Appellant's claim of overbreadth is based on unsubstantiated assertions about the effect of Local Law 63.

Appellant's several abstract arguments say the same thing in different ways—that Local Law 63 is overbroad because it will subject to governmental regulation a substantial number of clubs which should enjoy a constitutional right to be free from this regulation. "Application of the overbreadth doctrine . . . is, manifestly, strong medicine. It has been employed by [this] Court sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). In order to prevail, appellant must show that the statute curtails a substantial amount of constitutionally-protected conduct. *City of Houston, Texas v. Hill*, ___ U.S. ___,

107 S. Ct. 2502, 2508 (1987); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799-800 (1984); *New York v. Ferber*, 458 U.S. at 769; *Broadrick*, 413 U.S. at 615.

Appellant cannot meet its heavy burden. Indeed, appellant has refused to supply facts upon which to judge the validity of its claims (JA47 n. *; see *supra*, pp. 15-16). For example, appellant asserts that its member clubs are "selective" (App. Br. at 22, 25, 33-35). That word, standing alone, has no constitutionally-significant meaning. The question is, what are the selection criteria for particular clubs? And on this, appellant tells nothing. Nor has appellant told anything about any of the factors which this Court has considered significant in determining whether clubs should be accorded constitutional protection—i.e., the size of the clubs, their purposes, their selection criteria, the degree of participation of nonmembers, and their actual practices. *Rotary*, 107 S. Ct. at 1946; *Roberts*, 468 U.S. at 620.

As this Court held in *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. at 801: "[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." Appellant has failed to establish any "real" dangers to anyone; it has asserted only hypothetical ones based on unsupported statements.

B. Local Law 63 is constitutional on its face and not overbroad because its criteria respond directly to the constitutional concerns articulated by this Court in *Roberts* and *Rotary*. It is therefore very unlikely that there would be a substantial number of unconstitutional applications of the Law.

There is a good reason for appellant's failure to provide specific information about identifiable clubs. It is extraordinarily unlikely that any club meeting the criteria of Local Law 63 could make a plausible claim of constitutional protection. The City Council, after extensive hearings, passed a law that is directly

responsive to the constitutional concerns articulated by this Court in *Rotary* and *Roberts*.

1. The right of association—"intimate" and "expressive."

Contrary to the assumption which underlies appellant's argument (e.g. App. Br. at 11-17, 25, 35), this Court has never found a generalized constitutional "right of association." There is no constitutional right to associate with a select group of people, whatever the number of people or the purpose for which the people associate. This Court has held that there is a constitutional right only in two circumstances—when the association is "intimate" or when the association is for the purpose of expression. *Rotary*, 107 S. Ct. at 1945-47; *Roberts*, 468 U.S. at 617-618; 622-624.

"Intimate" associations that must, under the Constitution, be free from government interference are those "attend[ing] the creation and sustenance of a family—marriage, e.g. *Zablocki v. Redhail*, [434 U.S. 374, 383-386 (1978)]; childbirth, e.g., *Carey v. Population Services International*, [431 U.S. 678, 684-686 (1977)]; the raising and education of children, e.g., *Smith v. Organization of Foster Families*, [431 U.S. 816, 844 (1977)]; and cohabitation with one's relatives, e.g., *Moore v. East Cleveland*, [431 U.S. 494, 503-504 (1977)] (plurality opinion)." *Roberts*, 468 U.S. at 619. Although "intimate" association is not limited to family relationships, only relationships with the qualities inherent in the family "are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty." *Id.* 468 U.S. at 620. This Court defined those qualities of "intimacy" as "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Id.* 468 U.S. at 620. Thus, "intimate" associations worthy of constitutional protection must evidence, among other things, caring and personal commitment to the relationship, informational privacy among the associates, and indicia of an

enduring relationship. See generally, Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 630-637 (1980). As one commentator observed: "Caring for an intimate requires taking trouble to know him and deal with him as a whole person, not just as the occupant of a role. This fact alone limits the number of intimate associations any one person can have at any one time, or even in a lifetime." *Id.* 89 Yale L.J. at 634-635 (footnotes omitted).

This Court has also recognized a second kind of claim, a claim of "expressive association." About "expressive association" appellant's argument seems to be this: When men decide to join exclusive clubs and when the members decide to exclude women or minorities, these members are engaging in acts of self-definition. They are attempting to control their environment, to make it more pleasant, and to define and reinforce "who they are." These acts of self-definition, the argument goes, are "expressive" and therefore deserve constitutional protection.

This argument is very dangerous. Almost all human conduct can, with some force, be called "self-defining." A husband and wife make a personal choice of design for their home. A real estate developer wants to build the tallest building in the world. A group of lawyers want to set up a law practice without women as partners. Workers join together as a labor union and choose to exclude blacks. A parent wants to send his child to a racially-segregated educational institution. A community establishes a recreational facility from which it wants to exclude blacks because the residents wish to recreate only with fellow whites. A person wants to wear his hair as long as he wishes even though he is a police officer. These choices, and an almost unlimited number of others, could be viewed, with justification, as symbolically "self-defining." Yet it is permissible for government to zone in order to regulate population density, bulk or aesthetics (*Penn Central Transportation Co. v. New York*, 438 U.S. 104 [1978]; *Village of Belle Terre v. Borass*, 416 U.S. 1 [1974]; *Village of*

Euclid v. Ambler Realty Co., 272 U.S. 365 [1926]); or to prohibit labor unions or law firms from engaging in invidious discrimination (*Hishon v. King & Spalding*, 467 U.S. 69 [1984]; *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 [1945]); or to prohibit parents from having their children educated in a racially-segregated school (*Runyon v. McCrary*, 427 U.S. 160 [1976]); or to prohibit a community from excluding blacks from its recreational facilities (*Tillman v. Wheaton-Haven Recreational Ass'n, Inc.*, 410 U.S. 431 [1973]; *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 [1969]); or to prohibit a police officer from determining every aspect of his personal appearance (*Kelley v. Johnson*, 425 U.S. 238 [1976]). Accepting appellant's argument would require a drastic reformulation of settled doctrine concerning the permissibility of government regulation of a wide variety of conduct which could be considered "self-defining." See generally Tribe, *American Constitutional Law*, § 12-23 at 700-703 (1978).

This Court has not accepted such a radical view of the First Amendment.⁴³ The right of expressive association is much more limited. Organizations that can legitimately claim such a right are those like the NAACP or political parties—ones whose purpose is to communicate to others in order to advance ideas or beliefs "pertain[ing] to political, economic, religious or cultural matters . . ." *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. at 460. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-909 (1982) (The joining together to boycott businesses is

43. Appellant cites, *inter alia*, a statement of Justice Douglas, dissenting in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-80 (1972), to support its claim that this Court has construed the right of association of any number of people gathered for any purpose (App. Br. at 17). However, in *Moose Lodge*, the parties stipulated that Moose Lodge No. 107 "is, in all respects, private in nature and does not appear to have any public characteristics." *Id.* 407 U.S. at 179 n. 1. Thus, the issue there was not whether the Lodge was private, but whether the issuance of a liquor license to the Lodge constituted state action so as to make the Lodge's refusal to serve a black man a violation of the equal protection clause. Justice Douglas' gratuitous comment in his dissent, therefore, has no bearing on the issues presented here. Moreover, this Court's holdings in *Roberts, Rotary*, and *Hishon v. King & Spalding*, 467 U.S. 69 reject Justice Douglas' broad assertion that (407 U.S. at 180): "The individual can be as selective as he desires."

entitled to First Amendment protection because the purpose of the boycott was to express the idea and belief that civic and business leaders must stop discriminating on the basis of race.); *Buckley v. Valeo*, 424 U.S. 1, 15 (1975) (The freedom to associate means the ability to join with others for the common advancement of political beliefs and ideas.); *NAACP v. Button*, 371 U.S. 415, 429 (1963) (A group formed to promote civil rights through litigation is protected from governmental regulation by the First Amendment because the nature of the association is to promote ideas and beliefs of a minority group.). These "expressive" associations are quite different from the typical inward-looking downtown men's club.

2. The criteria of Local Law 63.

The criteria set forth in Local Law 63 respond very directly to the concern for "intimate" and "expressive" association articulated by this Court in *Rotary*, *Roberts*, and other cases. The Law applies only to clubs with more than 400 members. Size, of course, is directly related to "intimacy." The larger the group, the more attenuated the similarity to a family. How likely is it that 400 people will be "deeply attached" to each other or committed to a long-term relationship together? Is it likely that someone would be sharing the "distinctly personal aspects of one's life" with more than 399 other people? See *Roberts*, 468 U.S. at 619-620.

Local Law 63 does not apply unless a club meets two additional tests—the club must have regular meal service and it must regularly accept payments from or on behalf of nonmembers for use of club facilities in furtherance of a trade or business. These requirements add further assurance that a club covered by this Law will not be "intimate" in the constitutional sense. These two additional requirements also make it very likely that any club covered by the Law will not have as its sole or predominant purpose "expressive association." Indeed, the City Council found, after reviewing extensive material and testimony, that such clubs have a significant commercial purpose—one that

affects the economic life of the City (JA 15; see *supra*, pp. 2-9). This Court should not lightly reject the Council's judgment that significant commercial activity occurs at clubs covered by Local Law 63.⁴⁴

As this Court observed in *Roberts* with respect to the analogous Minnesota statute, laws like Local Law 63 (468 U.S. at 626):

reflect[] a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women.... Assuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests.

Local Law 63 reaches only clubs with significant commercial purposes. Commercial association has been accorded far less constitutional protection than has expressive association. See *Hishon v. King & Spalding*, 467 U.S. at 78; *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 457, 459 (1978); see also *Roberts*, 468 U.S. at 631, 635 (O'Connor, J., concurring).

Moreover, even with respect to the clubs covered by the Law, which do not deserve constitutional protection, the Law is quite circumspect. The Law does not dictate the manner in which the clubs conduct their activities or select their members (JA 16). It does not, contrary to appellant's assertion (App. Br. at 34; see also 10, 35, 38, 40), force admission of persons who "espouse contrary views." Clubs covered by the Law may continue to

44. See, e.g., *New York v. Ferber*, 458 U.S. at 757-58; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-53 (1964); *Katzbach v. McClung*, 379 U.S. 294, 303-04 (1964) (Congress legislated a conclusive presumption that a restaurant affects interstate commerce if it serves meals to interstate travelers or if a substantial portion of food served has moved interstate. This Court upheld Congress' determination based only on testimony at congressional hearings that refusal of service to blacks had imposed a burden on interstate commerce.).

screen applicants for admission on any subjective ground that is not invidiously discriminatory.⁴⁵

Because the City Council so carefully shaped Local Law 63, it is difficult to imagine a club that is covered by the Law that still could plausibly make a constitutional claim. Nonetheless, one could admit of such a possibility (even though no such club has been identified) without casting doubt on the constitutionality of Local Law 63. This Court has often ruled that such idiosyncratic instances of hypothetical unconstitutionality are insufficient bases upon which to predicate a finding of facial unconstitutionality. See *City of Houston, Texas v. Hill*, 107 S. Ct. at 2508; *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. at 800; *New York v. Ferber*, 458 U.S. at 772 n. 27; *Broadrick v. Oklahoma*, 413 U.S. at 618.⁴⁶

45. Nor has appellant introduced any evidence to suggest that the admission of women and minorities will impair whatever alleged expressive associational interests any of its 125 member clubs might have. This Court has rejected "unsupported generalizations about the relative interests and perspectives of men and women" as a basis to establish an infringement of expressive associational interests. *Roberts*, 468 U.S. at 628. See also *Rotary*, 107 S.Ct. at 1947 (admission of women will not interfere with Rotary Club's goals of humanitarian service and maintaining high ethical standards in all vocations); *Hishon v. King & Spalding*, 467 U.S. at 78 (rejecting a contention that a law firm's freedom of association was violated by the requirement that applicants for the position of partner be considered without regard to their sex; there was no showing that the law firm's ability to contribute to the ideas and beliefs of society would be inhibited by considering women for partnership).

46. If the appellant had made a showing that the admission of women into some of its member clubs in fact infringed the clubs' constitutional rights of association, this Court would then have to decide whether such an infringement was justified (1) in light of the compelling interest in eliminating the discriminatory barriers to economic and professional advancement of women and minorities (*Rotary*, 107 S. Ct. at 1947-48; *Roberts*, 468 U.S. at 622-623); and (2) in light of the fact that by permitting the clubs to use the same subjective criteria in considering applications from women and minorities, the Council had used the least restrictive means of accomplishing its goal. *Id.*

C. No club is prohibited from attempting to show that it is entitled to constitutional protection, and therefore exempt from the coverage of the City Human Rights Law, even though the club meets the criteria of Local Law 63.

Throughout its brief, appellant asserts that Local Law 63 creates an "irrebuttable presumption." What appellant means by "irrebuttable presumption" is this: "Local Law 63 precludes a club from demonstrating that, as a result of its size, purpose, selectivity and the exclusion of others from critical aspects of the relationship, it is entitled to constitutional protection under the analysis set forth by this Court in [*Rotary* and *Roberts*]." (App. Br. at 7; see also 9-10, 23, 31-32, 33, 35, 37). Appellant is simply wrong. Clubs are not precluded from attempting such a demonstration.

In its decision below, the New York Court of Appeals characterized the criteria in Local Law 63 as "permissive" (A11a) and plainly stated that those criteria were not exclusive. "Local Law No. 63 does not prohibit the City fact finder from considering the test of selectivity or, indeed, any of the *Power Squadrons* factors." (A9a). Appellant's answer is that the state's highest court "erred" in its interpretation of state law (App. Br. at 23, n.11). That answer ignores this Court's clear doctrine that the interpretation of state laws are left to the state courts. *New York v. Ferber*, 458 U.S. at 767; 769 n. 24; *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n. 5 (1982); *Terminiello v. Chicago*, 337 U.S. 1, 5-6 (1949).

Appellant would be wrong even if the Court of Appeals had not said what it did about Local Law 63. Judges of the New York State courts and officials of the City Human Rights Commission are sworn to uphold the United States Constitution. Of course they would—they are obligated to—consider a claim that, in spite of meeting the criteria set forth in Local Law 63, a club "is entitled to constitutional protection under the analysis set forth by this Court in [*Rotary* and *Roberts*]" (App. Br. at 7). The City Human Rights Commission does, in fact, consider constitutional defenses by parties who would otherwise be covered by the

City Human Rights Law. *E.g.*, *Cruz v. Blecher*, No. 016585 (N.Y.C. Comm. on Hum. Rgts, Feb. 3, 1987); *American Comm. on Africa v. The New York Times*, No. 5787-PA (N.Y.C. Comm. on Hum. Rgts, July 19, 1974), *vacated on other grounds sub. nom. The New York Times Co. v. City of New York Commission on Human Rights*, 79 Misc.2d 1046, 362 N.Y.S.2d 321 (Sup. Ct., N.Y. Co., 1974), *aff'd*, 49 A.D.2d 851, 374 N.Y.S.2d 9 (1st Dept., 1975), *aff'd*, 41 N.Y.2d 345, 393 N.Y.S.2d 312, 361 N.E.2d 963 (1977). As this Court said in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. at ___, 106 S. Ct. at 2724 (holding that the principle of *Younger* abstention applies to a state administrative proceeding):

[E]ven if Ohio law is such that the Commission may not consider the constitutionality of the statute under which it operates, it would seem an unusual doctrine . . . to say that the Commission could not construe its own statutory mandate in the light of federal constitutional principles.

Compare N.Y.S. Admin. Proc. Act (McKinney's 1984) (no provision preventing City Commission on Human Rights from considering constitutional issues).

Of course, saying that clubs may have their claims heard says nothing about the ease or frequency with which such clubs will prevail. In fact, it is difficult to imagine a club which meets the criteria of Local Law 63 but which could still show it was "entitled to protection under the analysis set forth" in *Rotary* and *Roberts*. That, however, is not a cause for criticism. It is a tribute to the care taken by the City Council in addressing the constitutional concerns articulated by this Court.

In several cases, this Court has held that statutes violated the Due Process Clause because they created irrebuttable presumptions. *See, e.g.*, *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v. Burson*, 402 U.S. 535 (1971). In each of those cases, the statutory

presumption bore no reasonable relationship to the ultimate fact to be proven, and there was no process by which the individual was permitted to establish facts particular to his or her case. In contrast, the criteria set forth in Local Law 63 are directly related to whether a club should be deemed not "distinctly private" within the meaning of the City Human Rights Law; and there are both judicial and administrative procedures in which a particular club can adduce evidence which it believes shows that it is unique and should be exempted from the application of the City Human Rights Law.⁴⁷

POINT III

THE EXEMPTION IN LOCAL LAW 63 FOR RELIGIOUS CORPORATIONS AND BENEVOLENT ORDERS DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

Appellant argues that, in order to sustain the constitutionality of Local Law 63, the City must carry the burden of showing that the distinction in the Law (exempting religious corporations and benevolent orders) is supported by a compelling state interest and that the Council used the least intrusive way to remedy the perceived evil (App. Br. at 41-42). This assertion is based on appellant's claim that the classification in the Law affects fundamental rights—namely the constitutional right to freedom of association.

47. Appellant also claims that Local Law 63 "chills" the First Amendment rights of clubs with fewer than 400 people because such clubs will "avoid increasing [their] membership for fear of coming within the provision's 400-members criterion" (App. Br. at 40). This argument presumes, incorrectly, that a club with fewer than 400 members, by that fact alone, warrants constitutional protection and that a club with fewer than 400 members is automatically exempt from the coverage of the City Human Rights Law. However, the Court of Appeals clearly stated that the criteria of Local Law 63 are not exclusive. Therefore, clubs with fewer than 400 members, are not, by that fact alone, automatically found to be "distinctly private." Such a club may be covered by the City Human Rights Law if, for other reasons, it is found to be a "public accommodation." As the Court of Appeals stated (A9a):

Local Law No. 63 does not purport to define for purposes of the City Human Rights Law all circumstances in which a club may not be "distinctly private."

Id. Appellant has urged upon this Court the wrong standard of review. In order to prevail, it is the appellant which must show that the classification in Local Law 63 is wholly irrational and does not serve any legitimate public purpose.

Appellant argues that Local Law 63 is underinclusive because, while it includes certain clubs (the typical downtown businessmen's club), it improperly excludes other associations "similarly situated" (religious corporations and benevolent orders).⁴⁸ As shown in Point II, any club that is covered by Local Law 63 is very unlikely to have a plausible claim for constitutional protection. Thus, whatever else may be said about the distinction between the type of club included in Local Law 63 and the excluded religious corporations and benevolent orders, the distinction does not affect any fundamental rights of the included clubs.

What appellant's equal protection argument comes down to is the more common assertion that there is no rational basis for the distinction made in the Law between the included clubs and others which are allegedly "similarly situated." On this point, appellant clearly has the burden of persuading the Court. "States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.'" *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (quoting *Lance v. Bradley*, 440 U.S. 93, 111 (1979)).

Here, as in Point II, appellant makes a purely hypothetical argument. Are there in fact "similarly situated" religious corporations or benevolent orders? Appellant has not pointed to one such real religious corporation or benevolent order in New York City—that is, one which has more than 400 members, regularly

48. Appellant argues in one breath that Local Law 63 is overbroad and, in another, that the law is underinclusive. In *Broadrick v. Oklahoma*, 413 U.S. at 607 n. 5, this Court described as "somewhat odd" the contemporaneous claims made there that the statute challenged was both overbroad and underinclusive.

serves meals and regularly receives payment from or on behalf of nonmembers in furtherance of trade or business. During the Council hearings, opponents of Local Law 63 raised the question of the exclusion of religious corporations and benevolent orders. Yet they did not point to one such organization in New York City that would meet the criteria of the Law. Similarly, from the beginning of these proceedings, appellant has maintained its equal protection challenge. Again, it has failed to adduce any evidence that its claim is more than hypothetical. It is not appropriate for this Court to decide appellant's equal protection claim in the absence of a concrete factual record. *See generally United States v. Raines*, 362 U.S. 17, 21 (1960) (The Court will not decide constitutional questions absent "actual controversies.")⁴⁹

Even if this Court were to assume, without proof, that there are such "similarly situated" religious corporations and benevolent orders in New York City, the classification chosen by the Council would be entirely appropriate. Those similarly situated should be treated alike. But, as this Court said in *Plyler v. Doe*, 457 U.S. 202, 216 (1981):

"[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940). The initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill.

49. Appellant cites cases where courts have pointed to business activities in certain benevolent orders. *See App. Br.* at 45-46. Those cases involve either issues unrelated to the constitutional issues raised in this case, or they involve orders outside New York City. These cases have no bearing on the correctness of the Council's findings here. There was no concrete evidence adduced before the Council indicating that, in New York City, benevolent orders and religious corporations are places where important business transactions are regularly conducted by members and nonmembers.

Moreover, legislation “does not violate the Equal Protection Clause merely because the classifications [it makes] are imperfect.” *New York City Transit Authority v. Beazer*, 440 U.S. 568, 592 n.39 (1979) (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 [1970]). This Court does not lightly ignore legislative findings supporting a classification. *New York v. Ferber*, 458 U.S. at 758; *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949).

In this case, the City Council had a sound basis for the exemption of religious corporations and benevolent orders. The hearings focused on the exclusion of women from private associations—specifically the affect of the exclusion upon the professional and economic lives of those excluded. The substantial evidence reviewed by the Council showed that exclusion from the downtown businessmen’s clubs did have a very harmful effect. In particular, the Council found that business activity does, in fact, often occur at downtown men’s clubs which have more than 400 members and which provide regular meal service allowing people to discuss business (JA 15). The Council also found that in New York City women and minorities are seriously disadvantaged in their business and professional careers by being excluded from these clubs.

The Council had no basis for making similar findings with respect to religious corporations and benevolent orders. Although the question of these organizations was raised during the hearings, *see supra*, p. 10, no concrete evidence was presented tending to show that these organizations in New York City had similar commercial purposes or economic impacts. Thus the Council found that because these organizations “have not been identified in testimony before the Council as places where business activity is prevalent, the Council has determined not to apply the requirements of this local law to such organizations” (JA 15).⁵⁰ In addition, the Council was quite sensitive to the constitutional issues raised by the legislation. The Council could well

50. - See *New York ex. rel. Bryant v. Zimmerman*, 278 U.S. 63, 75-76 (1978) (upholding disparate treatment of benevolent orders on the ground that

have believed that an association organized for religious or benevolent purposes could have a more serious claim of “expressive association” than the typical downtown businessmen’s club. In these circumstances it was entirely rational—indeed prudent—for the Council to cover only those kinds of clubs which, according to the record before it, did have substantial commercial purposes and economic impact. *Cf. Broadrick v. Oklahoma*, 413 U.S. at 607 n. 5 (“a State can hardly be faulted for attempting to limit” the reach of regulatory restrictions).

The Council’s findings are supported as well by the separate bodies of law governing religious corporations and benevolent orders. Local Law 63 brings within the City Human Rights Law clubs which provide commercial services to members and nonmembers. However, “religious corporations” are defined as “corporation[s] created for religious purposes.” N.Y. Rel. Corp. Law § 2 (McKinney 1952). As the court explained in *Johnston v. Hughes*, 112 App. Div. 524, 526, 98 N.Y.S. 525, 527 (1st Dept. 1906), *rev’d on other grounds*, 187 N.Y. 446, 80 N.E. 373 (1907), a religious corporation would be either “an incorporated church created to enable its members to meet for divine worship or other religious observances,” or “an incorporated congregation, society, or other assemblage, accustomed to meet for the same purpose.” Religious corporations are not the type of organizations which engage in business activity for the benefit of nonmembers.

Similarly, benevolent orders (also referred to as beneficial associations, benefit societies, or fraternal or friendly societies) are, by statute, organizations which are formed for the protection or relief of their members or their dependents. Section 4501(a) of the New York Insurance Law (McKinney 1985) defines a fraternal benefit society as:

[A]n incorporated society, order or supreme lodge, without capital stock, *formed, organized and carried on solely*

the legislature could use common sense and experience in making classifications); *cf. Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. at 252-53 (relying on congressional hearings, even though without congressional findings, to sustain the validity of the Civil Rights Law).

for the benefit of its members and of their beneficiaries and not for profit, operating on a lodge system and having a representative form of government, which obligates itself for the payment of insurance or annuity benefits or both in accordance with this article (emphasis supplied).

Moreover, religious corporations and benevolent orders are themselves the subject of separate bodies of legislative enactment, the Religious Corporations Law and the Benevolent Orders Law. The state legislature has thus indicated that these groups are subject to special, if not always different, treatment. Indeed, in other areas of legislation, benevolent orders have been singled out or exempted from legislative enactments. *E.g.*, N.Y. Educ. Law § 5001(2)(e) (McKinney 1981) (schools conducted by fraternal or benevolent orders not subject to state licensing requirements); N.Y. Civ. Rights Law § 53 (McKinney 1976) (benevolent orders exempt from registration and filing requirements applicable to membership and unincorporated associations).

Finally, the Council's classification is supported by a decision of this Court which, although decided in 1928, remains sound. *New York ex. rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928), involved a challenge to section 53 of the New York Civil Rights Law. That section required certain corporations and unincorporated associations (those administering oaths to members) to file by-laws and membership lists with the secretary of state. That statute excluded, among other organizations, benevolent orders. The Court held that the exclusion did not violate the Equal Protection Clause.

The Court started with the proposition, equally applicable here:

"that a State may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out."

Id. at 73 (quoting *Patson v. Pennsylvania*, 232 U.S. 138, 144 [1914]). The Court was not impressed with arguments about "symmetry":

"A lack of abstract symmetry does not matter. . . . It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named."

Id.

The Court recognized in *Bryant* that the legislation was aimed at the Ku Klux Klan. The secrecy surrounding the Klan was the "evil to be prevented." The Court deferred to the conclusion of the state legislature, based on common sense and experience, that benevolent orders (and the other exempted organizations) did not present a similar evil.

So, too, here the "evil to be prevented" was the economic and professional injury inflicted upon women and minorities by their exclusion from large downtown businessmen's clubs. The Council could properly pass legislation dealing with that evil and leave for another day the possibility of covering other kinds of associations if and when a showing was made that these other associations presented a similar evil.

CONCLUSION

**THE ORDER OF THE NEW YORK COURT OF
APPEALS SHOULD BE AFFIRMED.**

January 13, 1988

Respectfully submitted,

PETER L. ZIMROTH,
*Corporation Counsel of the
City of New York,
Attorney for Appellees.*

LEONARD J. KOERNER,
FAY LEOUSSIS,
PETER H. LEHNER,
MARTHA MANN,
of Counsel.

REPLY

BRIEF

FEB 12 1988

JOSEPH E. SPANIOLO, JR.
CLERK

No. 86-1836

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

NEW YORK STATE CLUB ASSOCIATION, INC.,
Appellant,
vs.

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF
NEW YORK, THE CITY HUMAN RIGHTS COMMISSION AND
THE MEMBERS OF THE CITY HUMAN RIGHTS COMMISSION,
Appellees.

**On Appeal from the Court of Appeals
Of the State of New York**

APPELLANT'S REPLY BRIEF

ALAN MANSFIELD
Counsel of Record

ANGELO T. COMETA
LOUIS J. LEFKOWITZ
DEBRA A. ROTH
PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
40 West 57th Street
New York, New York 10019
(212) 977-9700

Attorneys for Appellant

February 12, 1988

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APPELLANT'S REPLY BRIEF

Introduction

Contrary to appellees' assessment, Brief for Appellees¹ at 1, this case is not about large downtown businessmen's clubs which claim a right to discriminate against women and minorities.² The case is about the constitutionality of Local Law 63, an amendment which by its terms is patently at odds with the Court's analysis of the freedom of private and expressive association as articulated in *Board of Directors of Rotary International v. Rotary Club of Duarte*, ___ U.S. ___, 107 S. Ct. 1940 (1987) ("Rotary") and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) ("Roberts"). In addition, the local law improperly distinguishes between similarly-situated groups in contravention of settled equal protection principles.

The City peppers its brief with unsubstantiated and hearsay vignettes which were spilled over the informal legislative record and popular press. City's Br. 2-7. These stories are recited ostensibly to support an appropriate governmental purpose relating to the elimination of gender-based discrimination in New York City. None of these stories was ever offered as evidence at any stage of this litigation. They by no means represent proven fact and, to the extent they purport to predicate sociological truths,

¹ References to New York State Club Association, Inc.'s ("NYSCA's") Brief for Appellant will be abbreviated, "Br."; references to Brief for Appellees will be abbreviated, "City's Br."; references to the Joint Appendix will be abbreviated, "JA"; and references to the Appendix to the Jurisdictional Statement will be abbreviated, "JS." NYSCA's Rule 28.1 statement is at Br. 4 n.2.

² As the Appellees ("City") correctly observed in their January 28, 1985 Respondent's Brief at 12 n. submitted to the Appellate Division of the Supreme Court of the State of New York: "The local law is applicable to all places and clubs that fall within its scope regardless of whether they exclude women and minorities or engage in 'reverse discrimination' and exclude white males." See also Brief of Amici Curiae Francisca Club *et al.* ("Francisca Br.").

such conclusions are suspect.³ See generally Brief of the Conference of Private Organizations as Amicus Curiae, *passim* ("CONPOR Br."). Further, the City relies on factual allegations—none proven to be true and none made part of the record at any stage—made against four clubs although they have no bearing on NYSCA's challenge. City's Br. 13-14.

Moreover, the City misstates Local Law 63 when it posits that Local Law 63 does not create an "irrebuttable" presumption, City's Br. 11, 31, but rather creates "a very strong presumption" that a club meeting the three prongs falls within the amendment's reach. The plain language of Local Law 63 provides that a club "*shall not be considered in its nature distinctly private*" if it meets the three prongs. Nothing on the face of the amendment (or any other provision of the City's Human Rights Law) limits the conclusive "shall not" language.⁴ What is significant, however, is that

³ It is curious that the stories seem always to be those relating the experiences of very successful women. Apparently club membership was not the *sine qua non* of their achievement of high standing. City's Br. 2-7. See also Amicus Curiae Brief of City of Chicago at 3.

⁴ The Court of Appeals did not hold to the contrary, and NYSCA is by no means suggesting that the Court reject a state court's determination of state law. See City's Br. 18. The Court of Appeals, in rejecting NYSCA's argument that Local Law 63 is inconsistent with the Court of Appeals' construction of the state's Human Rights Law, ruled that the factors set forth in *United States Power Squadrons v. State Human Rights Appeal Board*, 59 N.Y.2d 401, 452 N.E.2d 1199, 465 N.Y.S.2d 871 (1983), were "permissive." JS 11a. Accordingly, and to clarify NYSCA's argument, Br. 23 n.11, the Court of Appeals noted that Local Law 63's three prongs, although different from the five factors listed in *Power Squadrons*, did not violate the state constitution's inconsistency clause. This only means that a club could be considered a place of public accommodation if it possessed characteristics not specifically addressed in *Power Squadrons*. JS 9a ("Thus, Local Law 63 does not purport to define . . . all circumstances in which clubs may not be 'distinctly private'."). But what it does not mean is that a club which would be protected under *Power Squadrons* (or *Rotary* and *Roberts*) would escape the stranglehold of the New York City scheme if it meets Local Law 63's three prongs. Notwithstanding the City's brand new interpretation of the Court of Appeals' decision, this

notwithstanding its proffered legislative goal, Local Law 63's irrebuttable presumption is predicated on a crazy-quilt test which is not appropriately tailored to the legislative objective it was designed to achieve.

I. THE STATE COURTS CORRECTLY FOUND THAT NYSCA HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF LOCAL LAW 63.

In an effort to deflect consideration of the merits, the City argues for the first time before any court—after more than three years of litigation—that NYSCA lacks standing. Compare *City of Houston v. Hill*, ___ U.S. ___, 107 S. Ct. 2502, 2512 n.16 (1987) (criticizing City's delayed assertion of abstention). The City did not make a passing reference to standing in opposition to NYSCA's motion for preliminary injunction and the ensuing interlocutory appeal, or in response to NYSCA's motion for summary judgment and at both levels of state appellate review, or in its Motion to Dismiss or Affirm. Indeed, the City's response to NYSCA's summary judgment motion was a cross-motion for summary judgment on the merits—a procedural device

is the very analysis which the City has advocated in the related proceedings alluded to in its brief. E.g., *New York City Commission on Human Rights v. Union League Club*, Index No. 285/87 (Commission on Human Rights), Memorandum of Law in Support of the Commission's Motion to Dismiss and to Compel Production dated January 11, 1988 at 12 n.5 ("The Club has admitted that it has approximately 1,600 members, and that it serves meals. . . . It is assumed that the Club would also admit that women are ineligible for membership and may not use certain Club facilities that are available to male guests of members. Thus, the Club's receipt of payments directly or indirectly from nonmembers for the furtherance of trade or business is the only issue to be resolved by this Court in determining whether the Club's invidious discrimination is unlawful."); *The University Club v. City of New York, et al.*, 86 Civ. 2330 (GLG)(S.D.N.Y. March 17, 1987), Reply Memorandum of Law in Support of Defendants' Motions to Dismiss and Consolidate dated July 14, 1986 at 5 ("Local Law 63 defines as a public accommodation any organization that meets three criteria. All other factors are irrelevant to the legal definition of 'public accommodation.'").

which was necessarily predicated on the City's assertion that no material fact issues were in controversy.⁵

Under controlling case law and the uncontradicted record, NYSCA is an appropriate entity to challenge Local Law 63. *Sua sponte*, the state courts unanimously and explicitly so held. JS 26a. The Court of Appeals, after noting NYSCA's representational capacity, JS 3a, affirmed.

Moreover, the City has argued that the judgment from which this appeal is taken is entitled to *res judicata* effect in federal court challenges brought by two of NYSCA's members, Union League Club and University Club, to challenge Local Law 63 as applied after administrative investigations were initiated against them by the City Human Rights Commission. See *University Club v. City of New York*, 655 F. Supp. 1323, 1326 (S.D.N.Y. 1987) (crediting NYSCA's standing under *Warth v. Seldin*, 422 U.S. 490 (1975)), appeal pending, No. 87-7372 (2d Cir. 1988) ("*University Club*"). It is ironic, indeed, that the City on one hand has sought to bar individual NYSCA members from prosecuting as-applied challenges to Local Law 63 on the ground that this litigation precludes them yet on the other hand seeks now to pretermitt review of the predicate judgment on newly-conceived standing grounds. See City's Br. 22-23. The City's tactics-aside, the record contains sufficient facts to demonstrate NYSCA's standing.⁶

⁵ In *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) ("*Village of Schaumburg*"), the Court of Appeals rejected the argument that the record consisting of affidavits discussing plaintiff's activities was insufficient because the challenge was to the face of the ordinance and "any issue of fact as to the nature of CBE's particular activities is not material . . . and is therefore not an obstacle to the granting of summary judgment." 590 F.2d 220, 223 (7th Cir. 1978). The Court did not dispute that analysis. 444 U.S. at 634.

⁶ Curiously, the City now suggests that NYSCA was derelict in providing discovery which would be relevant to the standing question. City's Br. 15-16. The record demonstrates the opposite: NYSCA filed answers and appropriate objections to the City's interrogatories in accordance with New York civil practice. To the extent the City believed

A. The Record Facts

The record shows that NYSCA is a not-for-profit corporation comprising approximately 125 private clubs, a substantial number of which are located in New York City. JA 10; de la Plante Affidavit in Support of Motion for Preliminary Injunction sworn to October 24, 1984 ("Oct. 24 Aff.") ¶ 2. NYSCA was created to promote the interests and welfare of private clubs in New York. JA 38. NYSCA has provided a structured forum for communication among its membership and has taken steps in judicial, political and legislative spheres to protect the constitutional rights of its members. Oct. 24 Aff. ¶ 3. Indeed, NYSCA was a vocal participant in the legislative hearings which preceded the enactment of Local Law 63, and there provided the City Council with factual information concerning its members and similarly-situated benevolent organizations. See, e.g., Testimony of Albert Blumenthal, Esq., Excerpts from the Meeting of the Committee on General Welfare, December 23, 1983 ("Blumenthal Tr. —").

The uncontradicted trial record establishes that a significant number of NYSCA's members "intentionally have been organized along national origin, religious, ethnic and gender lines; others have been formed primarily for the social and athletic benefits they provide." Oct. 24 Aff. ¶ 6; de la Plante Affidavit in Support of Motion for Summary Judgment sworn to April 16, 1985 ("Apr. 16 Aff.") ¶ 8, JA 32. NYSCA's members have "adhered to exacting standards in their admissions policies, governance and administration of their facilities." Oct. 24 Aff. ¶ 7; Apr. 16 Aff. ¶ 9, JA 32. Selectivity in admissions is critical because a club is formed for individuals to engage in social and/or recreational interchange with one another on a continual basis. Fostering congeniality among its membership

certain objections were unfounded, it had recourse to a motion to compel. Instead, undoubtedly aware that standing was appropriate, the City chose to accept the factual record to "expedit[e] disposition of this matter." JA 47 n.*.

is a private club's *raison d'être*. Oct. 24 Aff. ¶ 8; Apr. 16 Aff. ¶ 9, JA 32. Accordingly, "[i]n many clubs, applicants must be introduced and sponsored by several members. Further, the applicants are vigorously interviewed, and their backgrounds are thoroughly examined by established admissions committees." Oct. 24 Aff. ¶ 7. See *Francisca Br. 2-6*. Indeed, given the "highly subjective" nature of the admissions process, "[m]any of the New York City clubs have purposefully kept their admissions committees' deliberations confidential—even to the membership at large—to protect against embarrassment to candidates and their sponsors." Oct. 24 Aff. ¶¶ 7 and 8.

Contrary to the City's contention, City's Br. 2, NYSCA's membership is private and selective: "[t]he facilities, services and, for some, dining rooms of these clubs are available solely to their membership and *bona fide* guests. . . . and their publicity is not directed at the public at large, but rather is limited to their members." Oct. 24 Aff. ¶ 8. See City's Br. 24.

In light of Local Law 63's design to subject NYSCA's members to definition as public accommodations—thereby imposing regulation in violation of the members' freedom to associate—NYSCA established, and the City did not challenge, that its enforcement "will cause immediate, grave and irreparable injury" to NYSCA's membership. Oct. 24 Aff. ¶ 6; Apr. 16 Aff. ¶¶ 15 and 16, JA 34-35; Affirmation of Caryn M. Hirshleifer, May 24, 1985, JA 46 n.*.

B. NYSCA Is An Appropriate Representational Plaintiff.

Standing determinations require a two-fold inquiry. First, a litigant must satisfy the "case" or "controversy" requirement of Article III of the United States Constitution. Second, the litigant must meet Court-imposed prudential considerations to assure that the issues are neither premature nor insufficiently presented. See, e.g., *Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947, 955 (1984) ("*Munson*"). However, where

"protected speech or associative activities may be inhibited by the overly broad reach of the statute," the Court has relaxed general standing requirements to permit a plaintiff against whom the statute may be validly applied to raise the challenge on behalf of third parties not before the Court.⁷ *Village of Schaumburg*, 444 U.S. at 634.

The Court has long recognized that "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members." *Warth v. Seldin*, 422 U.S. at 511. In *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock*, 477 U.S. 274, 106 S. Ct. 2523 (1986), the Court reiterated the representational standing analysis set forth in *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977):

"[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

106 S. Ct. at 2529, quoting 432 U.S. at 343.

An amicus curiae brief in support of the City admits "that NYSCA satisfies Article III constraints, since its constituent clubs will suffer an injury-in-fact if New York City's ordinance is applied to them." Brief *Amicus Curiae* of American Civil Liberties Union Foundation, *et al.*, 22 n.8. Moreover, the City appears to concede, as it must, that NYSCA satisfies the second and third prongs of the *Hunt* test. City's Br. 22. The City's argument with respect

⁷ Aside from its *res judicata* Catch-22 argument, *supra* at 4, the City's suggestion that individual clubs should test Local Law 63 as overbroad, City's Br. 22-23, makes little sense because the facts pertaining to the individual clubs are irrelevant to this aspect of statutory review.

to the first prong is ill-founded. Threatened enforcement was alleged in the October 24, 1984 affidavit:

Representatives of the NYSCA have been advised that the City of New York intends to enforce the amendment's provisions upon its effective date or soon thereafter. Indeed, certain NYSCA members have been the subject of specific testimony before the City Council. There can be no doubt that these associations are prime targets of the legislation. The threatened enforcement of Local Law [63] will infringe on the constitutional rights of NYSCA member clubs which presently fall within the apparent scope of its provisions.

Oct. 24 Aff. ¶ 12; see also Verified Complaint, JA 12.

The City admitted these allegations and responded that enforcement would be stayed only until regulations were promulgated. JA 46 n.*. Indeed, a genuine threat of enforcement in itself is sufficient to confer standing to challenge the facial validity of the local law. See *City of Houston v. Hill*, 107 S. Ct. at 2508 n.7, citing *Steffel v. Thompson*, 415 U.S. 452 (1974). The threat was not overstated. Beginning January 30, 1986, the City commenced four administrative proceedings under Local Law 63. City's Br. 13. And, as the City concedes, any one of plaintiff's members would have standing to contest Local Law 63—an observation which in itself sufficiently responds to the first tier of the *Hunt* test. City's Br. 22. NYSCA is, therefore, an appropriate representational plaintiff. Cf. *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981) (Council, "an umbrella organization for a number of civic groups," unsuccessfully challenged a federal letterbox provision).

The City's reliance on *Rotary* to challenge standing is equally misplaced. City's Br. 21. In *Rotary*, a local club sued the international body to enjoin the revocation of its charter. Given the internecine dispute, the international could not assert the rights of its local's members because the local had eschewed its claim to private association.

Here, the record shows the positions of the representational plaintiff and its constituents are entirely consonant.

Not only does NYSCA meet the constitutional and prudential requirements of standing but its maintenance of this lawsuit has promoted an efficient and relatively expedient disposition of Local Law 63's constitutionality. Especially here where fundamental rights are at stake, the City's insistence—now for the first time after its having affirmatively urged the state courts to issue declaratory relief—that the Court dismiss this appeal in favor of protracted case-by-case constitutional adjudication is particularly unwarranted.⁸ City's Br. 22-23. Even if a club has the resources to bring suit, the litigation process itself will undoubtedly present a serious intrusion on the club's privacy.⁹ Clubs without funds to mount a constitutional challenge and larger social groups, which are not organized to litigate, will have to restrict their activities to comply with an enactment which runs afoul of *Rotary* and *Roberts*. As Justice Blackmun observed:

Even where a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further

⁸ Moreover, review is appropriate because regulations are in place and the highest court in the state has already had the opportunity to narrow Local Law 63 and refused to do so. See *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, — U.S. —, 107 S. Ct. 2568, 2572 (1987) ("*Jews for Jesus*"); cf. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 633 n.* (1976) (Rehnquist, J., dissenting) ("But as the New Jersey courts chose to entertain appellants' constitutional challenge to the Oradell ordinance despite its having never been applied, the considerations of equity, comity and federalism which underlie the holding in *Younger* are here largely absent.").

⁹ For example, while the City claims the local law puts a general membership list beyond the power of its subpoena, the City sought to obtain individual members' names from other sources, including dues and dining room registers. See Plaintiff's Answers to Interrogatories dated April 12, 1985.

in the protected activity. Society as a whole then would be the loser.

Munson, 467 U.S. at 956. The vindication of associational rights should not be left only to those hardy enough to enter into litigation with the government. Moreover, the chilling effect attendant to a protracted review of a law abridging first amendment freedoms, "make[s] such a case-by-case adjudication intolerable." *Jews for Jesus*, 107 S. Ct. at 2572. Under these circumstances, NYSCA's facial challenge to Local Law 63 should be heard on the merits.

II. LOCAL LAW 63 VIOLATES NYSCA'S MEMBERS' RIGHTS OF ASSOCIATION, PRIVACY AND SPEECH AND IS OVERBROAD.

In its principal brief, NYSCA demonstrated that Local Law 63 is fatally flawed because its mechanical three-pronged test is not (1) an appropriate measure of a club's public or private nature, (2) responsive to the freedom of association analysis set out in *Roberts* and *Rotary* and (3) narrowly tailored to achieve the local law's avowed purpose. Br. 11-38; *Roberts*, 468 U.S. at 622-23. Because of its irrebuttable presumption, Local Law 63 precludes a club from proving highly relevant indicia of privacy, including its highly selective membership policies, and that the forced admission of an unwanted member will irrevocably compromise the nature of the club's freedom of association. The local law does not describe truly commercial and public organizations and therefore burdens protected expressive rights of NYSCA's members and other political and religious associations. Nothing in the legislative record addressed a governmental need for an irrebuttable presumption; moreover, nothing in the testimony or submissions before the City Council anticipated the three prongs, let alone required them, to determine when a club should forfeit its private and expressive associational freedoms.

Instead of addressing these contentions, the City has dedicated most of its brief to arguing why the Court should not consider the merits. This is a surprising stand to be

taken by the litigant which successfully urged state courts to declare Local Law 63 constitutional on the identical record now claimed to be too "hypothetical."¹⁰ City's Br. 24. The City's argument is based on a misreading of the legislative and trial court record and a flawed understanding of NYSCA's constitutional challenge.

NYSCA's position, properly stated, is that Local Law 63 must be struck down because it creates a constitutionally infirm test which restricts protected activity. In this sense, it is indeed an overbreadth challenge. As Justice Blackmun explained: "'Overbreadth' has also been used to describe a challenge to a statute that in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest." *Munson*, 467 U.S. at 965 n.13. See generally Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 848 (1970) (observing that an overbreadth challenge is not "ineluctably vicarious" and can be asserted by a litigant whose conduct is impermissibly burdened). In addition, Local Law 63 creates a substantial risk of burdening fundamental rights of third parties. In this regard, NYSCA has raised a classic overbreadth challenge because there is a "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 446 U.S. 789, 801 (1984). JS 34a. Facial invalidation of the local law is mandated on both counts. See, e.g., *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Local Law 63's deficiency is analogous to *Munson's* facially unconstitutional fund-raising law which "in all its applications . . . operate[d] on a fundamentally mistaken

¹⁰ Moreover, the City argued and the district court found that NYSCA presented an adequate factual record describing the private and selective nature of its membership to predicate a *res judicata* dismissal. *University Club*, 655 F. Supp. at 1328.

premise that high solicitation costs are an accurate measure of fraud." 467 U.S. at 966. The Court reasoned:

Where, as here, a statute imposes a direct restriction on protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack.

467 U.S. at 967-68.

Similarly, in *Village of Schaumburg*, the Court struck on its face an ordinance which required a solicitation license applicant to attest that 75% of its receipts would be used for charitable purposes. 444 U.S. at 625. Although recognizing the government's substantial interest in protecting the public from fraud, Justice White explained that those interests were only peripherally promoted by the 75% requirement and could be served by a less drastic incursion on protected fundamental rights. 444 U.S. at 636-37. While the 75% rule could be applied to organizations engaging in fraud, an entire class of fundraisers faced an impermissible abridgement of its privileged activity. See also *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 70-71 (1981) (holding live entertainment enactment not drawn narrowly enough to justify first amendment infringement), quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) ("this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation").

Cognizant of its burden, the City attempts to show that the irrebuttable three prongs are somehow responsive to *Roberts* and *Rotary*. City's Br. 24. The City's argument, however, rests on its mistaken premise that the local law only reaches clubs with a "significant commercial purpose" and which "have an important impact on the economic life of the City." City's Br. 2, 28-29. But that is not what the

local law says. Local Law 63 is by no means limited to clubs which have a significant commercial purpose—by express design, it also affects clubs with only a limited or insignificant amount of commercial activity. This is because "regular" is not synonymous with "substantial." A club which can prove, if given the opportunity, that its revenue is predominantly not business-related is nevertheless deemed to be not "distinctly private."¹¹ Br. 26-28.

While the three factors may present "permissible" inquiries, the fundamental flaw in the local law is that its irrebuttable presumption precludes the demonstration of other (and far more relevant) characteristics which the Court has considered critical to a proper assessment of a club's freedom to associate.¹² Local Law 63's premise is misguided, and is not the least restrictive means to achieve the stated legislative purpose of eliminating discrimination

¹¹ The City's defense of the 400 member prong, City's Br. 28, fails to address the deficiencies set forth in NYSCA's principal brief. Br. 24-25. In essence, the City argues that the presence of 400 members creates a *per se* abrogation of constitutional rights. However, the unanimous *Roberts* Court necessarily rejected such a mechanistic and numerical approach as shown by its consideration of a host of other factors. The City also contends that the local law's regular meal service requirement assures that no club to which Local Law 63 applies could claim a legitimate right of private association. City's Br. 28. The City has disregarded the fact that the service of meals provides members an opportunity to socialize and does not imply a commercial purpose. The City also fails to address the fact that compliance with the local law necessarily will compromise first amendment rights. Br. 37; Brief of the Club Managers Association of America as Amicus Curiae, 4-8.

¹² Local Law 63 is also unconstitutional as a violation of due process because it represents the same kind of irrebuttable presumption condemned by the Court. City's Br. 32 (and cases there cited). See also *CONPOR* Br. 52-64. In those cases, the affected individual had no process by which to establish facts relevant to the statutory objective. The same dilemma exists here, and resort to affirmative constitutional challenges by the burdened party is no more a solution to Local Law 63 than it was in the irrebuttable presumption line of cases. Thus, Local Law 63's irrebuttable presumption violates the due process clause, and because it creates an irrational statutory classification, it also offends the equal protection clause. See generally *Point III infra*; L. Tribe, *American Constitutional Law* § 16-32 (1978).

in truly public places. See JA 63 (Greenfield, J., observing that Local Law 63 may not achieve its legislative goal). Its defects go to the heart of its operation in all its applications and require that the local law be stricken on its face.

The City fares no better in its discussion of NYSCA's expressive association challenge. Contrary to the City's cramped analysis of expressive association, City's Br. 26, the notion that NYSCA's members have gathered to express their view that certain kinds of social intimacy and discourse may only be achieved in single sex settings is neither "dangerous" nor at odds with the Court's prior opinions.¹³ Br. 34-35. The right to express one's viewpoint by joining a particular group includes the right to refuse to endorse the inclusion of persons whose positions are antagonistic to those of the group. Expressive association extends to social contexts, *Rotary*, 107 S. Ct. at 1947, and the freedom of association "plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623. Br. 32-38. Unlike commercial service organizations, *Roberts*, 468 U.S. at 623, for private social clubs the acceptance of a new member serves as an endorsement that the person is one who "belongs" because he or she identifies with the club's purposes and accepts its practices.

The City argues that because the local law affects only clubs where "significant commercial activity" occurs, the club's freedom to associate is diminished. City's Br. 29. The City's premise is wrong because substantial commercial activity is not measured by Local Law 63. Accordingly, under Justice O'Connor's analysis, *Roberts*, 468 U.S. at 635-36, a club's freedom to associate is not necessarily

¹³ In each case cited by the City, City's Br. 26-27, the Court has held that private discrimination is not afforded affirmative constitutional protection and must yield where publicly available opportunities are at issue. Br. 13. In a private social context, however, in which by definition there is a diminished government interest, Justice Douglas's admonition that an "individual can be as selective as he desires," is apposite. City's Br. 27 n.43. Cf., *Runyon v. McCrary*, 427 U.S. 150, 167 (1976) (rights of private social organization not at issue).

abrogated by meeting the three prongs, and the City has not met its burden of showing that Local Law 63 is the least restrictive means for achieving the government's purpose.

The City's response to the local law's overbreadth is also unavailing. City's Br. 33. Irrespective of whether NYSCA's membership of highly selective social clubs may be properly regulated, the rights of political clubs or those religious organizations formed under not-for-profit laws will be chilled by the prospect of Local Law 63's regulating their membership practices. Br. 40. Although the trial court addressed the issue, JS 34a, the City's only response is its meritless assertion that the existence of political and religious groups in New York City is speculative. What the City fails to address is the fact that political and religious groups do not forfeit their right to choose their members unless, as Justice O'Connor observed, they become public and commercial institutions. The local law insufficiently addresses a club's commercial nature, and its irrebuttable presumption impermissibly precludes an organization from showing that it is predominantly engaged in first amendment protected activity and that an unwanted member could compromise its views.

III. LOCAL LAW 63's EXEMPTION OF BENEVOLENT ORDERS AND RELIGIOUS CORPORATIONS VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION.

Again, in an effort to avoid a decision on the merits, the City for the first time challenges NYSCA's standing to raise an equal protection challenge.¹⁴ By doing so, the City seeks effectively to "insulate underinclusive statutes from constitutional challenge, a proposition [the Court] soundly rejected in *Orr v. Orr*, 440 U.S. 268, 272 (1979)."

¹⁴ Contrary to the City's argument, City's Br. 33-34, Local Law 63 implicates fundamental rights. Accordingly, the City must demonstrate that the local law's "classification has been precisely tailored to serve a compelling governmental interest." *Plyler v. Doe*, 457 U.S. 202, 217 (1982).

Arkansas Writers' Project, Inc. v. Ragland, —U.S. —, 107 S. Ct. 1722, 1726 (1987).¹⁵ The proposition should be rejected here as well.

The linchpin of the City's equal protection defense is its mistaken claim that the record does not establish that there exists a single similarly-situated benevolent order in New York City. City's Br. 10, 34-35. Even assuming such a demonstration were necessary in a facial equal protection challenge, the trial and legislative records supply it. Organizations such as the

Elks Lodge and Moose Lodge would appear to fall within the ambit of the newly enacted "three-pronged litmus test." Yet, even though they are less selective in their membership and more engaged in community affairs than the New York City private club members of the NYSCA, they will not be subject to the amendment's provisions, and, accordingly, their associational, speech and privacy rights will be protected. Such an invidious distinction should not be permitted.

Oct. 24 Aff. ¶ 11. In addition, the legislative record indicates that the American Legion, the Veterans of Foreign War, Moose Lodge, Elks Lodge and the Sons of Italy, each a benevolent order, meet the three prongs. Blumenthal Tr. 24, 60; Letter from Albert Blumenthal, Esq. to Hon. Carol Bellamy dated September 21, 1983 ("September 21 Letter"). With respect to those benevolent associations, the testimony further indicates that the Italian Rifle Club, the Columbus Citizens Club, the Lotus Club and the Cosmopolitan Club, each a social club, conduct their activities in the same manner. Blumenthal Tr. 31.

¹⁵ There is nothing "odd" in NYSCA's argument that the law is both underinclusive and overbroad. City's Br. 34 n.48. The law is underinclusive because it excludes similarly-situated benevolent orders and religious corporations. The law is overbroad, however, as to a totally different class—groups which are, for example, organized for purposes of political expression. Under these circumstances, the two shortcomings of the local law are not incompatible.

The City Council was also informed that there was no reason to distinguish between the all-male Sons of Italy and the all-male Italian Rifle Club. Blumenthal Tr. 59. The legislative record reveals that benevolent organizations are similarly-situated to private clubs:

Thus it would appear that the Moose Lodge and the Elks Lodge, each of which was organized under the Benevolent Orders Law, has more than 100 members, provides regular meal service, and has members who will be reimbursed by non-members for fees, dues or other services will be excluded from the amendment.

Even more anomalous results are possible. For example, while the New York Athletic Club may lose its exemption under Introductory 513, American Legion Post #754, which is comprised of NYAC members and holds its functions at NYAC facilities could freely discriminate within that club simply because the American Legion is organized under the Benevolent Orders Law.

September 21 Letter.

The City Council was further advised: "[a]s already noted, there seems little basis for the arbitrary criteria proposed, or for the exemptions given private organizations other than clubs." NYSCA's Brief in Opposition to [Local Law 63] dated May, 1983 at 22. NYSCA also commented that the motive for proposing the "novel criteria" of Local Law 63 was more "political than legal" and that other groups were exempted simply to "reduce political opposition." See Br. 48-49. "Surely the selective membership policies of private clubs are not significantly different in nature or import from the selective membership policies of private, fraternal, sororal or civic groups." Blumenthal Tr. 16. See also Comments submitted to the Committee on General Welfare of the City Council of New York by CONPOR in Opposition to [Local Law 63] dated December 22, 1983 at 14. CONPOR's expertise concerning the activities of benevolent organizations should not be lightly

dismissed: CONPOR is a conference of private organizations whose members include benevolent orders such as the Elks, Moose and Red Men. CONPOR Br. 3-4 n.3.

The similarities between the conduct of NYSCA's members and the conduct of benevolent orders are only revealed in judicial decisions, Br. 44-46, but are also a matter of common knowledge.¹⁶ See Gale's Encyclopedia of Associations (21st ed. 1987) (Catholic Daughters of the Americas, which is listed in the Benevolent Orders Law and therefore qualifies as exempt under Local Law 63, has 165,000 members, all women, and maintains a building in New York City). In addition, two judges who had occasion to consider NYSCA's equal protection challenge found the groups to be similarly-situated. In his dissent, Justice Kupperman stated: "[t]he Benevolent Orders Law lists a large number of organizations with substantial membership and eating facilities, which would, accordingly, be exempt, even though they would otherwise be in the category that should be subjected to a nondiscrimination clause." JS 21a.

In *University Club*, Judge Goettel found that, although the equal protection argument was barred by *res judicata*, "it is not a frivolous claim. . . . Not only is a lot of business done at benevolent and religious clubs, but they are also an important source of political patronage and influence." *University Club*, 655 F. Supp. at 1328 n.10.

Indeed, the legislature must have understood that benevolent and religious groups, like NYSCA's members, would meet the three prongs or the exemption would have been superfluous. Yet, the legislative and trial proceedings have shown that the existence of the exemption will permit the exempted class to engage in the very type of conduct (discrimination) which Local Law 63 is ostensibly designed to eradicate. Under these circumstances, a specific exemption for benevolent orders and religious corporations

¹⁶ It is noteworthy that the municipalities which copied Local Law 63 into their own laws deleted the benevolent order exemption. See Amicus Curiae Briefs of Boston, Chicago, Los Angeles, San Francisco and Wilmington.

does not further any legitimate legislative objective but defeats it.¹⁷

Equally unconvincing is the City's argument that the local law is justified because separate bodies of law govern the exempt groups, and that because benevolent orders are statutorily defined as existing for the benefit of their members, they are therefore not "public." City's Br. 37. Neither proposition was alluded to in the legislative record; moreover, the occasional separate treatment accorded the exempt groups under unrelated statutes is of no consequence in an equal protection analysis.¹⁸ Br. 46-48. "[T]he constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary. In determining what is within the range of discretion and what is arbitrary, regard must be had to the particular subject of the state's action." *Smith v. Cahoon*, 283 U.S. 553, 566-67 (1931).

The City does not contest the fact that the City Council heard no evidence to support the exemption and, to the extent there was testimony on the subject at all, such testimony was against it. In this context, statutes are voided where the legislative history is silent as to the

¹⁷ The City also tries to legitimize the exemption of benevolent orders and religious corporations in Local Law 63 by arguing that the City could appropriately "leave for another day" the possibility of including other kinds of associations. City's Br. 39. The Court, however, has repudiated such an approach where the first amendment is implicated. "[B]ecause of the First Amendment interests at stake here, the one-step-at-a-time analysis is wholly inappropriate." *City of Renton v. Playtime Theatres, Inc.*, ___ U.S. ___, 106 S. Ct. 925, 934 (1986) (Brennan, J., dissenting), citing *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 215 (1975).

¹⁸ The City's reliance on *New York ex rel Bryant v. Zimmerman*, 278 U.S. 63 (1928), in this context is inapposite. There, the exclusion of benevolent orders from the filing requirement of Section 53 of the Civil Rights Law was premised on the legislative determination that benevolent orders had for many years justified their existence and were not an actual danger to the state. 278 U.S. at 75-76. Their exemption, therefore, was related to the purpose of the statute. The exemption at issue here bears no similar relationship.

reason for discriminatory classifications. See *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266, 272-74 (1936).

Accordingly, the City cannot demonstrate that Local Law 63's exemption is supported by a rational, let alone a compelling, basis; it therefore denies NYSCA's members equal protection of the laws.

CONCLUSION

The Court of Appeals' order should be reversed and Local Law 63 should be declared unconstitutional and void.

Respectfully submitted,

ALAN MANSFIELD

Counsel of Record

ANGELO T. COMETA

LOUIS J. LEFKOWITZ

DEBRA A. ROTH

PHILLIPS, NIZER,

BENJAMIN,

KRIM & BALLON

40 West 57th Street

New York, New York

10019

(212) 977-9700

Attorneys for Appellant

Dated: February 12, 1988

AMICUS CURIAE

BRIEF

(1)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

NEW YORK STATE CLUB ASSOCIATION, INC.,
Appellant,
v.
THE CITY OF NEW YORK, THE MAYOR OF
THE CITY OF NEW YORK, THE CITY HUMAN
RIGHTS COMMISSION and THE MEMBERS OF
THE CITY HUMAN RIGHTS COMMISSION,
Appellees.

On Appeal From the Court of Appeals of the
State of New York

**BRIEF OF
THE CLUB MANAGERS ASSOCIATION OF AMERICA
AMICUS CURIAE
IN SUPPORT OF APPELLANT**

JOHN M. WOOD
Counsel of Record
DAVID C. EVANS
REED SMITH SHAW & McCLAY
1150 Connecticut Avenue, N.W.
Suite 900
Washington, D.C. 20036
(202) 457-6100
Attorneys for Amicus Curiae
Club Managers Association
of America

David Ferber
Of Counsel

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The Club Managers Association of America respectfully submits this brief *amicus curiae* in support of appellant.¹

INTEREST OF CLUB MANAGERS ASSOCIATION OF AMERICA

The Club Managers Association of America ("CMAA") is a professional association for managers of private membership clubs. CMAA's 4,000 members manage over 2600 country, city, athletic, faculty and military clubs. Memberships in these clubs may be limited on the basis of gender, profession, college attended, national origin, religious belief or family background. CMAA believes New York City Local Law 63 of 1984 interferes with the constitutional protections afforded members of certain of these organizations to remain selective in their associations. Many of CMAA's members are located in New York City. CMAA also is concerned about the impact of this case throughout this country. Ordinances comparable to Local Law 63 have been enacted or have been under consideration in other cities across America. The legality of these attempts to interfere with citizens' rights of association, privacy and speech depends on the outcome of this case.

STATEMENT OF THE CASE

The New York City public accommodation law² was amended by Local Law 63 of 1984 to provide criteria

¹ Written consent to the filing of this brief *amicus curiae* in the Supreme Court of the United States has been obtained from all parties to the case. Copies of the consent letters accompany this brief.

² The New York City Human Rights Law forbids invidious

for determining whether a place of accommodation is "distinctly private" and thus not subject to the law. It provides that:

[a]n institution, club or place of accommodation shall not be considered in its nature distinctly private if it has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business.

Administrative Code of the City of New York, Title 8 § 8-102(9). In a Legislative Declaration, the City Council set forth its basis for the tripartite test of Local Law 63:

[T]he city of New York has a compelling interest in providing its citizens an environment where all persons, regardless of race, creed, color, national origin or sex, have a fair and equal opportunity to participate in the business and professional life of the City, and may be unfettered in availing themselves of employment opportunities. Although City, State and Federal Laws have been enacted to eliminate discrimination in employment, women and minority group members have not attained equal opportunity in business and

discrimination in "place[s] of public accommodation, resort or amusement." Administrative Code of the City of New York, Title 8 § 8-107. It excludes from its definition of "public accommodation" "any institution, club or place of accommodation which . . . is in its nature distinctly private." § 8-102.

the professions. One barrier to the advancement of women and minorities in the business and professional life of the City is the discriminatory practices of certain membership organizations where business deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed.

Legislative Declaration, Local Laws, 1984, No. 63 of City of New York § 1. After this case was begun, New York City adopted regulations³ interpreting various terms used in Local Law 63. They are set forth in the Appendix hereto.

SUMMARY OF THE ARGUMENT

1. Under an interpretative regulation, the condition respecting "furtherance of trade or business", which could be determinative within the meaning of New York City Local Law 63 as to whether a club is not "distinctly private," includes whether "other payment [is] made in connection with an individual's trade or business, including entertaining clients or business associates, holding meetings or other business-related events." If this language should be construed to mean whether business is discussed on the premises of the club, it could result in a policing of conversation in violation of the freedom of speech of members and nonmembers. This language also is void-for-vagueness.

³ New York City Commission on Human Rights, Regulations: Unlawful Discriminatory Practices in Institutions, Clubs or Places of Accommodation Which Are Not Distinctly Private, (Eff. date August 1, 1985).

2. New York City Local Law 63 precludes the careful assessment of objective considerations necessary to determine the limits of government infringement on the constitutional right of free association and speech by arbitrarily imposing a numerical threshold as a primary determinative factor.

ARGUMENT

I. LOCAL LAW 63 VIOLATES THE CONSTITUTIONAL RIGHT OF FREEDOM OF SPEECH BECAUSE IT REGULATES SPEECH ON THE BASIS OF CONTENT USING MEANS THAT ARE NOT NARROWLY TAILORED TO THE STATED GOVERNMENT INTEREST, AND IT IS IMPERMISSIBLY VAGUE.

Under Local Law 63 the third criterion for determining whether or not an organization is distinctly private focuses on the regular receipt of payment from or on behalf of nonmembers for furtherance of trade or business. The regulations enacted by the City after the initiation of the New York State Club Association's lawsuit attempted to correct the amendment's obvious imprecision. The regulations state that:

[p]ayment 'for the furtherance of trade or business' shall mean payment made by or on behalf of a trade or business organization, payment made by an individual from an account which the individual uses primarily for trade or business purposes, payment made by an individual who is reimbursed for the payment by the individual's employer or by a trade or business organization, or *other payment made in connection with an individual's trade or business, including entertaining*

clients or business associates, holding meetings or other business-related events.

New York City Commission on Human Rights, Regulations: Unlawful Discriminatory Practices in Institutions, Clubs or Places of Accommodation Which Are Not Distinctly Private, ¶ 1(d) (emphasis added). Thus, whether a club is public or private may turn in part on whether a payment is "in connection with an individual's trade or business."

Because there is neither law nor regulation prescribing what is "in connection with an individual's trade or business", discussion of business on the premises of the club may be viewed as meeting this requirement. If so, any conversation taking place during a meeting, meal or over drinks becomes crucial. If a member or nonmember meets at the club and discusses business on the requisite number of occasions, the club could lose its distinctly private status and become subject to public accommodation laws. If there is no discussion in connection with trade or business on the requisite number of occasions, the club may be free to retain its traditional membership policies. By imposing this consideration and by imposing the public accommodation law as a result, Local Law 63 effectively regulates the content of club members' conversations. Yet, "what a municipality may *not* do under the First and Fourteenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression. . . . '[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Hudgens v. NLRB*, 424 U.S. 507, 520 (1976)(quoting *Police Dept. of Chicago v. Mosley*, 408

U.S. 92 (1972)), on remand, 531 F.2d 1342 (5th Cir. 1976), later proceeding, 95 L.R.R.M. (BNA) 1351 (1977). Local Law 63 burdens the freedom of speech of club members and nonmembers because it may require consideration of the content of their discussions at the club.

A statute that attempts to burden speech has a strong presumption of unconstitutionality and will be strictly scrutinized to determine its necessity to serve a compelling state interest and to ensure that the means used are narrowly tailored to attainment of that interest. *Widmar v. Vincent*, 454 U.S. 263, 270 (1981).

The third condition of Local Law 63 is not narrowly tailored. Whether a payment has been made in connection with trade or business may not be capable of determination without involvement of the administrators of the clubs. Are they to be burdened with the responsibility of monitoring the private conversations of members and nonmembers? This forced intrusion upon the conversations of members and nonmembers will infringe upon speech that is entitled to constitutional protection. In *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984) ("Roberts"), this Court noted that "a 'not insubstantial part' of the Jaycees' activities constitutes protected expression on political, economic, cultural, and social affairs." 468 U.S. at 626. While this Court held that there was no basis in the record for concluding that the admission of women would impede the Jaycees' ability to engage in these protected activities, it was not faced with a statute such as Local Law 63 that seems to contemplate the monitoring of conversation. Like the Jaycees clubs, some club members involved in this appeal en-

gage in activities worthy of constitutional protection under the First Amendment. But unlike the Jaycees clubs, members of the clubs subject to Local Law 63 will be chilled from engaging in speech that is constitutionally protected for fear of sacrificing their club's traditional membership policies.

It is difficult to see the necessity of imposing this burden on the administrators and members of clubs in order to protect club members' freedom of association when other methods for determining whether a club is distinctly private are available. In *Roberts*, the determination whether a club was worthy of constitutional protection involved the consideration of many factors, none of which required consideration of the nature of meetings or uses of the club. There was no intrusion upon the constitutionally protected speech of members and nonmembers.

The third condition of the tripartite test of Local Law 63 also is fatally defective because the phrase "in connection with an individual's trade or business" is so vague as to be insufficient to provide members and nonmembers with criteria defining what discussions will result in their club being deemed non-private. "The void-for-vagueness doctrine reflects the principle that 'a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *Roberts*, 468 U.S. at 629 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). "Vague laws in any area suffer constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that

is reachable by the police power, freedom of speech or of the press suffer." *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966).

In *Roberts*, this Court concluded that the Minnesota act did not implicate concerns arising from the void-for-vagueness doctrine because the Minnesota Supreme Court used a number of specific and objective criteria, such as size, selectivity, commercial nature and use of public facilities, to construe the act in a manner that did "not create an unacceptable risk of application to a substantial amount of protected conduct." 468 U.S. at 630-31. However, Local Law 63 does create just such an unacceptable risk of application to protected conduct. The phrase "in connection with an individual's trade or business" is undefined; men and women of common intelligence must necessarily guess at its meaning and may differ as to its application. What types of discussions are "in connection with an individual's trade or business" are not readily determined. Whether a lunch or a drink with a nonmember business associate without any discussion of business is in connection with trade or business is unknown. To preserve their traditional membership policies, club members may refrain from engaging in certain kinds of speech which may be deemed to further the business interests of the members even though in a social setting. The statute, by its very existence, has a chilling effect on protected expression.

II. LOCAL LAW 63 VIOLATES THE CONSTITUTIONAL RIGHTS OF PRIVATE ASSOCIATION AND FREE SPEECH BECAUSE IT ARBITRARILY APPLIES TO AN ORGANIZATION WITH MORE THAN 400 MEMBERS, AND THUS PRECLUDES THE CAREFUL ASSESSMENT OF OBJECTIVE CHARACTERISTICS WHICH THIS COURT HAS FOUND NECESSARY TO DETERMINE THE LIMITS OF GOVERNMENT INFRINGEMENT.

The CMAA agrees with appellant that the automatic classification of a club as not distinctly private if it falls within the three qualifications set forth in Local Law 63 infringes upon the members' freedom of intimate association that this Court has made clear is protected by the Constitution. *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, ___ U.S. ___, 107 S. Ct. 1940, 1945 (1987) ("Rotary"); *Roberts*, 468 U.S. at 619 (1984). In particular, the size condition of Local Law 63 ignores the principles laid down by this Court for determining the extent to which a state may interfere with this constitutional protection.

Local Law 63 begins the classification of a club as distinctly private by determining whether the organization has a membership totalling more than 400. Thus, any further consideration under Local Law 63 as to whether a club is distinctly private is based, at the threshold, on the mere size of the club. This initial classification of a club on the basis of an arbitrary membership total is not in accordance with the decisions in *Roberts* and *Rotary*. In those cases, this Court considered such characteristics as size, purpose, selectivity, and whether others were excluded from critical aspects of the organizations involved to determine whether the organizations were within the

class of relationships that are constitutionally protected under the right of association. *Rotary*, 107 S. Ct. 1940, 1946; *Roberts*, 468 U.S. at 620. In *Roberts*, this Court concluded that the Jaycees chapters were outside the protected category, noting that "[d]etermining the limits of state authority over an individual's freedom to enter into a particular association . . . unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." 468 U.S. at 620. This Court conducted the requisite careful assessment by evaluating relevant factors and found that Jaycees chapters were neither small nor selective and that much of their activity involved the participation of nonmembers.

A similar evaluation was conducted by this Court in *Rotary*. It concluded that California's Unruh Civil Rights Act⁴ did not interfere unduly with the club members' freedom of intimate association in light of the lack of restriction on the size of local clubs which was a result of their aim to produce an inclusive, not exclusive, membership, the public purposes of the their service activities and the participation of nonmembers.

Both *Roberts* and *Rotary* require that a careful assessment be conducted to determine whether a par-

⁴ The Unruh Civil Rights Act provides, in part: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. Cal. Civ. Code § 51 (West 1982).

ticular association is entitled to constitutional protection. This Court's use of the term "spectrum" demonstrates that there is no bright line that neatly divides groups into the protected and unprotected categories. The fact that this Court in *Roberts* and *Rotary* considered size as one factor in determining selectivity has led to the mistaken conclusion that it is the sole, or at least the threshold, criterion. In concluding that Local Law 63 is narrowly drawn, the Supreme Court of the State of New York stated that the "400 membership requirement appears to be derived from [sic] *Roberts v. United States Jaycees* case which found a 400-450 membership not sufficiently small or exclusive to warrant protection." *New York State Club Ass'n v. City of New York*, No. 25028/84, slip op. at ___ (Sup. Ct. N.Y. Co. Oct 28, 1985).⁵ Likewise, appellees argue that in *Roberts* the Court "found that an organization with over 400 members was too large and unselective to invoke a right to intimate association." Appellee's Motion to Dismiss or Affirm at 22, *New York City Club Ass'n v. City of New York*, No. 86-1836 (U.S. filed July 18, 1987). Based on this erroneous interpretation of this Court's decision in *Roberts*, it appears that the drafters chose 400 for the first prong of Local Law 63.

While size is a factor in the assessment whether an organization is public or private, its real importance lies in its reflection of selectivity.⁶ In *Roberts*,

⁵ Reprinted in Appellant's Jurisdictional Statement at 32a, *New York State Club Association, Inc. v. City of New York*, No. 86-1836 (U.S. filed May 15, 1987).

⁶ The importance of selectivity is supported by other courts which have considered whether an association is private. See,

this Court viewed size in conjunction with selectivity and concluded that the local Jaycees, with memberships of 430 and 400 and which employed no criteria for judging applicants for membership apart from age and sex, were "neither small nor selective." 468 U.S. at 620 (emphasis added). In *Rotary*, this Court noted that the "size of local Rotary clubs ranges from fewer than 20 to more than 900" and that there was "no upper limit on the membership of any local Rotary Club." 107 S. Ct. at 1946. These variations and the lack of limitation on size convinced this Court in *Rotary* that the purpose of the clubs was to produce an inclusive, not exclusive, membership. Unlike the Jaycees, many of the clubs that would be affected by Local Law 63 do have an upper limit on membership.

The arbitrariness of the 400 member limit as the threshold qualification of Local Law 63 is further highlighted by a comparison of this law with other proposed and enacted ordinances in other cities. The recently enacted District of Columbia law begins its determination with clubs of more than 350 members while the Philadelphia bill sets the limit at 200 members.⁷ These different standards will result in different constitutional protection in different geographical locations. Thus, a 250 member club which meets the

e.g., *Kiwanis International v. Ridgewood Kiwanis Club*, 806 F.2d 468, 473 (3d Cir. 1986), cert. dismissed, 56 U.S.L.W. 3167 (U.S. Sept. 8, 1987); *Brown v. Loudoun Golf & Country Club, Inc.*, 573 F. Supp. 399, 403 (E.D. Va. 1983); *United States v. Trustees of Fraternal Order of Eagles, Milwaukee Aerie No. 137*, 472 F. Supp. 1174, 1175 (E.D. Wis. 1979); *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1203 (D. Conn. 1974).

⁷ D.C. Code Ann. § 1-2519 (1987); Philadelphia, Pa., Bill No. 835 amending Chapter 9-1100 of the Philadelphia Code, (introduced February 20, 1986).

final two conditions of the test would be entitled to constitutional protection in New York and the District of Columbia, while members of an identical club in Philadelphia would not be entitled to protection of their right of association. This result is the natural consequence of using an arbitrary membership limit as the key determinative factor in assessing whether a club is public or private.

Local Law 63 applies the New York City public accommodations law to private clubs based on size without consideration of selectivity. The law's arbitrary application to clubs with more than 400 members sacrifices the constitutional protections afforded by *Roberts* and *Rotary* for the sake of administrative convenience. Administrative convenience may not be considered at the expense of constitutional freedoms.

The arbitrary size limit of Local Law 63 also is unconstitutional because it infringes upon the speech and associational rights of club members. When a classification, such as Local Law 63, burdens a fundamental right, the government must demonstrate that the law is narrowly tailored to effectuate a compelling governmental interest. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982), *reh'g denied*, 458 U.S. 1131 (1982). While the intent of Local Law 63 may well implicate a compelling governmental interest, the use of an arbitrary numerical threshold to achieve this interest is not narrowly tailored. One lower court judge who considered the challenge to Local Law 63 noted that "[t]he stated objective of Local Law [63] is to open up clubs and organizations where business deals are made to minorities and women. It is not readily apparent that the means adopted in the local law will achieve that objective." *New York State Club Ass'n*,

Inc. v. City of New York, No. 25028/84, slip op. at 9 (Sup. Ct. N.Y. Co. Nov. 8, 1984).

The primary effect of the arbitrary number of members in Local Law 63 may well be to encourage clubs to keep their membership totals below 400. This incentive to refrain from the addition of new members directly inhibits members from exercising their freedoms of association and speech. In addition, many public clubs will be able to avoid the scrutiny of Local Law 63 simply because they have fewer than 400 members. The more careful assessment laid down in *Roberts* and *Rotary* better serves the goal of determining which clubs are truly private. This analysis also avoids an arbitrary membership limit that unconstitutionally infringes upon the constitutional protections afforded club members.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,
John M. Wood

Counsel of Record

David C. Evans

REED SMITH SHAW & MCCLAY
1150 Connecticut Ave., Suite 900
Washington, D.C. 20036
(202) 457-6100

DAVID FERBER
Of Counsel

Attorneys for *Amicus Curiae*
Club Managers Association of
America

November 19, 1987

APPENDIX

REGULATIONS**UNLAWFUL DISCRIMINATORY PRACTICES IN
INSTITUTIONS, CLUBS OR PLACES OF
ACCOMMODATION WHICH ARE NOT DISTINCTLY
PRIVATE**

1. Definitions. The definitions in this section shall be used by the New York City Commission on Human Rights in determining whether an institution, club, or place of accommodation is "distinctly private" as that term is used in the New York City Human Rights Law, Administrative Code Section B1-1.0 *et seq.*
- a. "Payment directly from a nonmember" shall mean payment made to an institution, club or place of accommodation by a nonmember for expenses incurred by a member or nonmember for dues, fees, use of space, facilities, services, meals or beverages.
 - b. "Payment indirectly from a nonmember" shall mean payment made to a member or nonmember by another nonmember as reimbursement for payment made to an institution, club or place of accommodation for expenses incurred for dues, fees use of space, facilities, meals or beverages.
 - c. "Payment on behalf of a nonmember" shall mean payment by a member or nonmember for expenses incurred for dues, fees, use of space, facilities, services, meals or beverages by or for a nonmember.
 - d. Payment "for the furtherance of trade or business" shall mean payment made by or on behalf of a trade or business organization, payment made by an individual from an account which the individual uses primarily for trade or business pur-

poses, payment made by an individual who is reimbursed for the payment by the individual's employer or by a trade or business organization, or other payment made in connection with an individual's trade or business, including entertaining clients or business associates, holding meetings or other business-related events.

- e. "Members" shall mean individuals belonging to any class of membership offered by the institution, club, or place of accommodation including, but not limited to, full membership, resident membership, nonresident membership, temporary membership, family membership, honorary membership, associate membership, membership limited to use of dining or athletic facilities, and membership of members' minor children or spouses.
- f. "Regular meal service" shall mean the provision, either directly or under a contract with another person, of breakfast, lunch, or dinner on three or more days per week during two or more weeks per month during six or more months per year.
- g. "Regularly receives payment". An institution, club or place of accommodation "regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirect, from or on behalf of nonmembers for the furtherance of trade or business" if it receives as many such payments during the course of a year as the number of weeks any part of which the institution, club or place of accommodation is available for use by members or non-members per year.

AMICUS CURIAE

BRIEF

(8)
No. 86-1836

FILED

NOV 19 1987

CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

NEW YORK STATE CLUB ASSOCIATION, INC.,
Appellant,

v.

THE CITY OF NEW YORK, THE MAYOR OF
THE CITY OF NEW YORK, THE CITY HUMAN
RIGHTS COMMISSION and THE MEMBERS OF
THE CITY HUMAN RIGHTS COMMISSION,
Appellees.

**Appeal From the Court of Appeals of the
State of New York**

**BRIEF OF THE CONFERENCE OF PRIVATE
ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF
THE APPELLANT**

THOMAS P. ONDECK
Counsel of Record
BRADLEY L. JOSLOVE

BAKER & MCKENZIE
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 298-8290

*Attorneys for Amicus Curiae
The Conference Of Private
Organizations*

November 19, 1987

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The Conference of Private Organizations respectfully submits this brief as amicus curiae in support of the appellant, New York State Club Association, Inc. ^{1/}

INTEREST OF AMICUS

The right of people to join together in private associations has long been recognized as a fundamental and necessary liberty in a free society. Aristotle observed that "man is a social animal." The basic social need to belong and be among friends has been met in this nation by a myriad of private membership organizations. These organizations strengthen our democracy and contribute to the unique pluralism and diversity of our country.

^{1/} Written consent to the filing of this brief amicus curiae in the United States Supreme Court has been obtained from all parties to the case. Copies of the consent letters accompany this brief.

In his classic commentary on the role of democracy in America, Alexis de Tocqueville recognized that the American propensity to form private associations arises from and is protected by the inalienable right of private association, a right he warned against limiting:

The most natural privilege of man next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and acting in common with them. The right of association therefor appears to be almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.

A. de Tocqueville, Democracy in America, at 196 (Bradley ed. 1954).

More recently, this Court explained that the right of association has assumed a central role in safeguarding liberty.

[C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power

of the State. Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.

Roberts v. United States Jaycees, 468 U.S. 609, 618-619 (1984) (citations omitted).

The Conference of Private Organizations ("CONPOR"), an informal coalition of private membership organizations, ^{2/}

^{2/} The following organizations are members of CONPOR: the National Club Association, whose membership consists of more than 1,000 private social clubs which have about one million individual members; the Benevolent and Protective Order of Elks, a benevolent, ritualistic, and fraternal society that charters approximately 2,250 lodges, which have approximately 1,650,000 members; the Loyal Order of Moose, a benevolent, ritualistic and fraternal society that charters approximately 2,250 lodges, which have approximately 1,300,000 members; the Great Council of U.S. Improved Order of Red Men, a benevolent, ritualistic, and fraternal society that charters approximately 940 local lodges, which have approximately 53,616 members; Kiwanis International, a social and service organization that charters approximately 8,200 local Kiwanis clubs with approximately
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was formed in order to defend and protect the fundamental right of its members, and citizens generally, to associate freely and privately upon such terms and conditions as they shall solely determine. CONPOR promotes this right by participating in judicial cases, sharing information, and providing comments to

313,000 individual members; the National Association of American Business Clubs whose membership consists of 136 private clubs, which have over 6,600 individual members; the United States Power Squadrons, whose membership consists of 450 local groups, which have over 67,000 members.

As noted, CONPOR is a coalition of a wide variety of membership organizations, each with its own peculiar charter, governance, tradition, usage and purpose. For this reason, the possible impact or applicability of governmental regulation, like Local Law 63 and its progeny, may differ greatly among CONPOR members. Due to the diversity of purposes and activities of CONPOR member organizations, the observations made herein do not, in each instance, have equal applicability to each member of the informal conglomeration which comprise amicus.

legislative and administrative officials. 3/

CONPOR's interest in this case first arises from its alarm over the gross misconceptions underlying Local Law 63, the New York City law under review here. New York, N.Y., Local Law No. 63 (Oct. 24, 1984). The legislation is grounded on the baseless notion that private clubs 4/

3/ CONPOR supports the arguments advanced in the brief of the Appellant. CONPOR wishes to emphasize, however, that a decision by the Court striking down the New York law in issue solely because it exempts benevolent and religious organizations from its sweep -- a flaw that might be easily corrected by legislative amendments (and that is not found in other similar legislation enacted by other cities) -- would be regrettable in the extreme. The associational rights of members of all private organizations hinge on how this Court decides the broader issues of the scope of the constitutional right of private association and the method which the government is permitted to use in determining which organizations fall within its scope.

4/ Although Local Law 63 purports to apply to all private organizations which satisfy the law's tripartite test (other than benevolent and religious organizations which are specifically exempted), the parties to this litigation have
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function merely as "marketplaces" or "arenas" where critical business contacts are made and deals are struck. This "marketplace" of business contacts and deals, it is alleged, is so indispensable to career success that full access to the marketplace must be mandated by the coercive power of government. Both the underlying assumption that clubs are "marketplaces," and the conclusion that clubs are indispensable to career success, are without substance.

The marketplace argument reflects a basic misunderstanding of what transpires among the members of private clubs. Private clubs are formed in order to provide a comfortable and congenial social atmosphere for compatible members to associate and engage in benevolent, char-

apparently, by tacit agreement, classified those organizations subject to the law as "private clubs." CONPOR membership is not so limited.

itable, fraternal, sororal, political, academic, cultural, social, or recreational interchange with one another on a regular basis. In fact, the vast majority of clubs (and all benevolent and charitable organizations) were formed for non-business purposes and actively discourage use of the club for the furtherance of business interests. In a recent article critiquing Local Law 63, Roger Starr, who is a member of the Editorial Board of the New York Times and former Commissioner of the New York Housing Development Administration, explained that the advocates of the law have a distorted view of private clubs:

Critics of men-only clubs paint a picture of them that is unrecognizable to their members. Critics insist that clubs are significant institutions, but members actually belong because the clubs lack significance; they are simply places that offer a few minutes of serenity in a turbulent city. The clubs do not control art, or the professions, and surely not the busi-

ness or governmental life of New York City. It's impossible for the members to prove that they do not control the city's business and politics; the burden of proving that they do rests with their critics Members join for two reasons only: convenience and congeniality.

Starr, Men's Clubs, Women's Rights, 89
Pub. Interest 57, 68-69 (Fall 1987).

Advancing the careers of club members is not among the purposes of benevolent, charitable, fraternal, sororal and social clubs. In fact, if it is known that a candidate seeks membership in order to solicit business or to make business contacts, clubs would consider that a significant factor against offering membership to the candidate. ^{5/} Membership

^{5/} See, e.g., Affidavit of Peter R. Shepherd at 4 (filed in Union League Club v. City of New York, No. 86 Civ. 2343 (S.D.N.Y. March 17, 1987), appeals filed, Nos. 87-7312, 87-7372 (2d Cir. April 15 and 16, 1987)) ("While there are no objective 'qualifications' for membership, I am advised that certain aspects would work against a candidate being elected. For example, if it is apparent that a candidate seeks membership to
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in most of these organizations is not extended as a means of attaining success; rather, new members typically have already achieved significant success. For example, the Cosmos Club in Washington, D.C., long the focus of fervent protest against its all-male membership policy, only accepts nominations for membership from those already recognized as leaders in their fields of endeavor. Not surprisingly, the average age of members of the Cosmos Club is over 65 years, an age at which one is reaping the fruits of one's career, not still planting the seeds.

No one denies that some members occasionally discuss business at private social clubs. Members are, of course, permitted to discuss anything they wish.

solicit business or business contacts, or as a means to gain access to the Club's facilities for business purposes, that would be considered a significant element against election.")

The topics of conversation do not change according to whether one is entertaining a friend or business associate (the two are often the same) at one's home, one's club, or a public restaurant or bar. Implicit in the marketplace theory is the concept that access to a club will enable a member to be a part of any business discussions and meetings occurring at the club. This theory likens the club's dining and meeting rooms to the floor of the New York Stock Exchange where access entitles one to participate in all deals which are being made. Following this theory, if two people are discussing a business deal over lunch at the club, a member at the next table who overhears their conversation need simply lean over and put in his bid. This, of course, totally misrepresents the actual club setting, where private discussions are discreet and

confined. Whether a member or nonmember, one cannot simply join in a private conversation unless invited. ^{6/}

CONPOR supports the goal of providing equal access to all that is essential to career success, but submits that Local Law 63 does not advance this goal. It has never been proven that membership in private clubs is important, let alone essential, to career success. There have been no judicial or administrative rulings

^{6/} Ironically, in order to qualify as "distinctly private," a club is compelled to interfere in the private affairs of its members in an oppressive and intrusive way. At present, clubs have no knowledge whether particular members may have business relationships with certain of their guests, what subjects they may be discussing at lunch, or whether the member obtains reimbursement for the lunch bill. Forcing the club to inquire into all these matters in order to remain "distinctly private" is a clear invasion, compelled by the state, of the members' privacy. Since the New York law, as implemented by regulations, applies if members entertain guests for business purposes even though there is no reimbursement, a club could not comply without literally monitoring the conversations between every member and guest.

to that effect. The New York City Council relied on anecdotes from a few individuals who claimed that their careers had been retarded or damaged because they had been unable to join certain private clubs. Such testimony, of course, only establishes that a perception exists, albeit mistaken, that membership in a private club is essential to career success. The findings of Robert O. Snelling, Sr., ^{7/} one of the foremost experts in the field of career placement, contradict this perception. In his important work, The Right Job (1987), Mr. Snelling exhaustively analyzed the elements important in finding "the right

^{7/} Robert O. Snelling, Sr. is Chairman of the Board and President of Snelling, Inc., the world's largest network of franchised employment services. Mr. Snelling was appointed to the 1986 White House Conference on Small Business, and serves on the U.S. Labor Department's Special Advisory Committee on Employment and Unemployment.

job." Membership in private clubs is not even mentioned as a factor. His findings are corroborated by a 1986 study conducted by Korn/Ferry International, a leading executive search firm, in which approximately 1300 senior executives responded to a question asking them which activities had a significant impact on their careers. In summarizing the responses Korn/Ferry stated: "Social contacts, ... received scant attention. Almost no one cited leisure activities and fraternal organizations as having contributed significantly to his advancement." Korn/Ferry International's Executive Profile: A Survey of Corporate Leaders in the Eighties (1986). Membership in any other private organizations was not even mentioned by the executives.

Finally, a reasoned finding that there is a compelling governmental need to

open up certain clubs to women would have to depend on a finding, not only that vital business is frequently discussed at these clubs, but that the clubs provide an avenue indispensable to career success. No such showing has been made. In a large metropolitan area such as New York City, there are scores of distinguished private clubs, many of which admit women as members, and thus make available to women any "business opportunities" which private clubs may be perceived to confer. In that situation, there is no public interest in forcing women into every club that would outbalance the admitted infringement of the club members' associational freedoms.

In sum, Local Law 63 rests on the baseless assumption that clubs are marketplaces of business opportunities to which everyone must be allowed access. The reality, however, is that clubs are often

pleasant settings where most people are pleased to be welcomed, but they are not marketplaces. They are not formed or maintained to promote the business interests of their members or nonmembers and nothing of a business nature is done, said or achieved there that is not replicated daily at a myriad of public restaurants, meeting rooms or recreational facilities.

As a national organization, CONPOR is also concerned about the impact of this case on private organizations throughout the country. Los Angeles, Chicago, Buffalo, the District of Columbia, and San Francisco have recently enacted ordinances, modeled after Local Law 63, prohibiting discrimination by organizations which are not distinctly

private. ^{8/} Legislation patterned after Local Law 63 has also been introduced in Philadelphia. ^{9/} In Detroit, an ordinance modeled after Local Law 63 was adopted by

^{8/} Los Angeles, Cal., Ordinance No. 162426 (approved May 28, 1987); Chicago, Ill., Amendment of Municipal Code Chapter 199A Concerning Nondiscrimination of Membership By Various Organizations (enacted June 1987); Buffalo, N.Y., Ordinance Amendment - New Article XXIII Added to Chapter VII - Discriminatory Practices Concerning Membership or Facilities (enacted Sept. 16, 1987); District of Columbia, Bill 7-157 (enacted Oct. 1987); San Francisco, Cal., Ordinance Amending Part II, Chapter VIII of the San Francisco Municipal Code (Police Code) By Adding Article 33B Thereto, Regarding Prohibition Against Discrimination by Clubs Or Organizations Which Are Not Distinctly Private (passed by the Board of Supervisors November 16, 1987).

Furthermore, although for reasons of political expediency Local Law 63 presently exempts benevolent and religious organizations from its sweep, other jurisdictions which have recently enacted similar ordinances have not adopted the same exclusions. Hence, several CONPOR members, benevolent organizations in particular, find themselves not directly impacted in New York City, but facing Local Law 63-type regulation in other cities.

^{9/} Philadelphia, Pa., Bill No. 835 amending Chapter 9-1100 of the Philadelphia Code (introduced February 20, 1986).

the city council only to be vetoed by Mayor Coleman Young because, inter alia, he wished to avoid costly litigation pending the outcome of the present case. ^{10/}

This growing use of the fundamentally flawed tripartite test originated by Local Law 63 represents a wholesale attack on the associational rights of members of private associations, and particularly, members of private social clubs. Although most of the journalistic reporting, as well as much of the legislative history, of Local Law 63 is in terms of the admission of women to men's clubs, this is not the legal issue. Local Law 63 does not even refer to gender. The legal issue is

^{10/} Coleman Young, Mayor of Detroit, Letter to the Detroit City Council (July 24, 1986) (notifying the Council of his veto of the private club ordinance #14-86 adopted by the Council on July 16, 1986).

whether what heretofore have been regarded as benevolent, charitable, fraternal, sororal and social clubs can now be reclassified as public accommodations on the basis of purely arbitrary standards legislated for the explicit purpose of converting the legal status of private clubs into that of public accommodations. 11/

11/ The consequences of permitting such arbitrary standards to govern can best be illustrated by the situation in the District of Columbia where the Council has recently approved Bill 7-157, which is virtually identical to Local Law 63. An organization classified as a public accommodation in the District of Columbia is forbidden to discriminate on the basis of some 16 different categories (D.C. Code Ann. §1-2519 (1987)), including personal appearance, family responsibilities, matriculation, marital status, age, place of residence and source of income, which were characterized by the Washington Post (October 7, 1987) as a "compendious, not to say bizarre roster of those who cannot be discriminated against." To subject private clubs to these public accommodation provisions would, in the words of the Washington Post, "be as absurd as it is intrusive." Numerous private organizations and clubs within the District of Columbia, and elsewhere, have different dues schedules for resident and non-resident members, and have special reduced dues

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Local Law 63, and the growing number of analogous laws in other cities, take away from club members the right to determine their membership policies and practices. It is this right to choose those with whom one will share one's values and beliefs on a regular and continual basis, in a word, "selectivity," which is the very essence of private clubs. The loss of this right would destroy the camaraderie and desire to belong which make club life so special. Clubs would become nothing more than public accommodations. To treat clubs as

for members who are more than a certain age, which may range from 65 to 80. Many clubs also have an age threshold in order to vote. Clubs often maintain strict dress codes to enter the clubhouse, or, at least, to attend certain functions or use the formal dining room. Some clubs require college degrees for membership. Regardless of what the proponents of this legislation now say their intention is, these and other benevolent practices would appear to be outlawed under the plain language of the Human Rights Act, if private organizations and clubs are classed as public accommodations.

public accommodations, thus destroying their special private character, would so reduce their appeal to present and prospective members that the effect would be economically ruinous. This needless destruction of the private club heritage, so long a cherished part of our culture, would not only be a loss to millions of club members, as well as the millions of men and women who belong to fraternal and sororal organizations, it would diminish this nation's diversity and pluralism which private organizations have played such an important role in developing.

SUMMARY OF ARGUMENT

The right of private association has been recognized by this Court in numerous decisions as a fundamental constitutional right which protects groups, such as private clubs, from unwarranted inter-

ference by the state. In two recent decisions, Roberts and Rotary, this Court found that the determination of which associations warrant constitutional protection unavoidably entails a case-by-case, careful assessment of objective characteristics, such as size, purpose, selectivity, and whether nonmembers are excluded from critical aspects of the relationship.

Local Law 63 abridges the constitutional right of private association because it creates an irrational, irrebuttable presumption which precludes the careful consideration of objective characteristics which the Court in Roberts and Rotary found necessary in order to determine the limits of a state's authority over the freedom of an individual to enter into a particular association. Local Law 63 only permits the consideration of three

criteria: whether a club (1) has more than 400 members, (2) regularly provides meal service, and (3) regularly receives payments from members or nonmembers in furtherance of business or trade. Consideration of any other factor is precluded.

In place of the constitutionally mandated assessment of all objective characteristics, Local Law 63 substitutes a tripartite test which is completely inadequate as a means of determining which relationships are protected by the constitutional right of private association. The test fails to address the core distinction between private clubs and public accommodation, i.e., whether the organization has a plan or purpose of exclusiveness. The first criterion sets forth an arbitrary size limit which ignores the role of highly selective membership policies in making a club

private and exclusive. The second criterion, regular meal service, is immaterial and would actually support the private nature of a club. To "break bread" with another is an intimate experience which one does not share with the general public. Indeed, nowhere does one have meals more regularly than in one's own home, the very epitome of privacy.

The third criterion is as misguided as the first two. The private nature of the relationships between club members is unaffected by the source of a member's payments or the topic of conversation. Moreover, the fact that a club receives some payments which further the business interests of members or nonmembers does not change the avowed purposes of the club or convert it into a commercial entity. The receipt of funds from nonmembers does

not give the nonmembers any role in the operations of the club, nor any of the rights of membership. The fact that a member invites a business associate to his club for lunch should no more turn the club into a public accommodation than it should turn one's home into a public accommodation if the lunch were at one's home.

In addition, the occasional rental of part of the club facilities by an outside group does not detract from the private nature of the relationships between club members. If a private club's rental of unused space to a nonmember group or individual transforms the club into a public accommodation, then, by this logic, a homeowner would forfeit the right to privacy in his own home if he were to rent one or more rooms in the home or an apartment over his garage to someone outside his family.

In short, the private status of a club should not be defined by the origin of its revenues, but by the nature of the relationships between club members.

The law also violates the equal protection and due process clauses of the Federal Constitution. Local Law 63 denies to members of a subclass of private organizations -- private clubs which meet the arbitrary tripartite test -- the right to demonstrate that their club involves the kinds of personal and exclusive relationships meant to be protected by the constitutional right of private association from unwarranted state interference. The members of other private organizations are permitted to present any and all evidence probative of their claim to private status. This discrimination against members of a subclass of private organizations is unconstitutional because it is

not necessary for the attainment of a compelling governmental interest, nor is it the means least restrictive of constitutional rights.

As an alternative to the inaccurate, irrebuttable presumption employed by Local Law 63, the City of New York could allow the presentation of evidence probative of the factors analyzed by this court in Roberts and Rotary. New York City could also employ the method of analysis used by the Federal Equal Employment Opportunity Commission in determining whether an organization qualifies as a bona fide private membership club exempt from Title VII coverage pursuant to the Civil Rights Act of 1964. Both of these alternatives would meet the legislative purpose of preventing discrimination in places of public accommodation, and would do so without trampling on the associational

rights of members of benevolent, charitable, fraternal, sororal and social organizations.

ARGUMENT

I. LOCAL LAW 63 VIOLATES THE CONSTITUTIONAL RIGHT OF PRIVATE ASSOCIATION BECAUSE IT PRECLUDES THE CAREFUL ASSESSMENT OF OBJECTIVE CHARACTERISTICS WHICH THE COURT IN ROBERTS AND ROTARY FOUND NECESSARY TO DETERMINE THE LIMITS OF A STATE'S AUTHORITY OVER THE FREEDOM OF AN INDIVIDUAL TO ENTER INTO A PARTICULAR ASSOCIATION

A. The Right of Private Association Is a Fundamental, Constitutional Right Which Protects Certain Private Organizations From Unwarranted State Interference

The Supreme Court has expressly recognized that the right of private association is a fundamental, constitutional right which protects groups, such as private clubs, from unwarranted interference by the state. In Bell v. Maryland, 378 U.S. 226 (1964), Justice Goldberg stated:

[i]t is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.

378 U.S. at 313 (concurring) (emphasis added).

Pursuant to this constitutional principle, the Court has held that a state may not exclude a group from a public park merely because it has an "all-Negro, all-Oriental, or all-white" membership policy. Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974). The Court cited with approval at 575 the dissenting opinion of Justice William O. Douglas, joined by Justice Thurgood Marshall, in Moose Lodge No. 107 v. Irvis 407 U.S. 163 (1972). In that case, Justice Douglas wrote:

My view of the First Amendment and the related guarantees of the Bill

of Rights is that they create a zone of privacy which precludes government from interfering with private clubs or groups. The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires. So the fact that the Moose Lodge allows only Caucasians to join or come as guests is constitutionally irrelevant, as is the decision of the Black Muslims to admit to their services only members of their race.

407 U.S. at 179-80 (footnote omitted).

In two recent cases the Court reaffirmed the principle that the freedom of private association is a fundamental element of individual liberty protected by the Constitution. The Court stated in Roberts v. United States Jaycees, 468 U.S. 609 (1984):

The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of

sanctuary from unjustified interference by the State.

468 U.S. at 618-619 (citations omitted). Similarly, in Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 55 U.S.L.W. 4606, 4608 (May 4, 1987), this Court expressed, "the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights."

B. Determining the Limits of State Authority Over an Individual's Freedom to Enter Into a Particular Association Unavoidably Entails a Case-by-Case, Careful Assessment of Objective Characteristics

While reaffirming the constitutional basis of the freedom of private association recognized in earlier cases, the Court in Roberts and Rotary noted that not all associations merit constitutional protection. The Court held that only those relationships which are, among other

things, "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship," warrant constitutional sanctuary from state interference. Roberts, 468 U.S. at 620.

The Court did not specifically list which relationships warrant this constitutional protection, preferring instead to outline the process by which the determination must be made. The Court stated, "determining the limits of state authority over an individual's freedom to enter into a particular association . . . unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." Rotary, 55

U.S.L.W. at 4608 (quoting Roberts, 468 U.S. at 620). The objective characteristics which the Court found relevant include size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship. Rotary, 55 U.S.L.W. at 4608 (citing Roberts, 468 U.S. at 620-621). ^{12/}

In Roberts and Rotary, the Court conducted a "careful assessment" which focused on "objective characteristics" to

^{12/} The factors identified by the Court as relevant are consonant with those used in other cases in which the courts considered whether an association is private. See cases cited in Brief of the Conference of Private Organizations as Amicus Curiae in Support of Appellant's Jurisdictional Statement at 13 n.9, New York State Club Ass'n v. City of New York, No. 86-1836 (U.S. June 17, 1987). This line of cases provides a useful and long-accepted means to distinguish private organizations from public accommodations. For example, the Ridgewood Kiwanis Club was held to be not a "public accommodation" because, inter alia, it is selective and not open to the public at large. Kiwanis Int'l v. Ridgewood Kiwanis Club, 806 F.2d 468 (3d Cir. 1986), cert. dismissed, 56 U.S.L.W. 3167 (Sept. 1, 1987).

determine whether the relationships among Jaycees and Rotarians, respectively, were sufficiently private and exclusive so as to warrant constitutional protection. In both cases, the Court found that the relationships were not constitutionally protected.

Despite appellees' suggestion in their Motion to Dismiss or Affirm, the specific holdings in Roberts and Rotary do not dispose of the present case. In fact, the Court in Rotary expressly left open the question whether membership in selective private clubs involves the sort of private relationships meant to be protected by the Constitution. Rotary 55 U.S.L.W. at 4609 n.6. ^{13/}

^{13/} Furthermore, a comparison of the attributes of benevolent, charitable, fraternal, sororal and social organizations with the attributes which the Supreme Court found in Roberts with respect to the Jaycees, and in Rotary with respect to the Rotary Clubs, underscores the fundamental differences
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C. The Tripartite Test Created by Local Law 63 Precludes A Case-by-Case, Careful Assessment of Objective Criteria

In direct contravention of the holdings in Roberts and Rotary, Local Law 63 precludes the "careful assessment" of "objective characteristics" which the

between the two kinds of organizations. The most marked difference is seen in the area of membership admission policies and practices. Rotary Clubs and Jaycees Chapters generally use broad objective standards for choosing members. Private organizations, on the other hand, are highly selective and predominantly choose members on the basis of subjective criteria. The description of a typical private club selection process, which appears at pages 41-42, infra, demonstrates the rigorous screening which most selective private clubs undertake before offering membership to a candidate.

A second distinction that separates Rotary and Jaycees from benevolent, charitable, fraternal, sororal and social organizations is that the latter afford much greater opportunity for their members to interact personally and frequently within the organizational settings. Their members are actively encouraged to use the facilities to come together almost daily so that high levels of camaraderie and friendship result from the personal contacts. Most of these organizations, in contrast to Rotary and Jaycees, maintain permanent facilities (e.g. "lodges" or "clubhouses") which their members can and do frequent regularly.

Court found unavoidable "in determining whether a particular association is sufficiently personal or private to warrant constitutional protection." Rotary, 55 U.S.L.W. at 4608; Roberts, 468 U.S. at 620. It precludes this careful assessment by creating an irrebuttable presumption that a private social club which meets the law's tripartite test is "not distinctly private." If a private club is found to be not distinctly private, it loses its discretion and independence by becoming subject to a broad range of public accommodation regulations which go to the very core of the club's membership policies, purposes, and practices. ^{14/}

^{14/} Subjecting private clubs to public accommodation laws would not only involve New York City in the membership policies of private clubs, it would entangle the City in a host of internal club practices. For example, the City of Los Angeles, pursuant to a complaint brought under a
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Local Law 63 permits the consideration of only three factors -- whether a club has more than 400 members, regularly provides meal service, and regularly receives payments from members or nonmembers in furtherance of trade or business; the examination of all other factors is prohibited. The law precludes the consideration of a club's selectivity in admission of members, whether it has a plan or purpose of exclusiveness, whether it specifically excludes nonmembers from participation in the club's central functions, and other objective characteristics which this Court analyzed in Roberts and Rotary in order to determine

recently enacted law which mimics Local Law 63, has begun an investigation into the gender-based scheduling of tee off times and the maintenance of an informal men's grill until 2:30 p.m. (after which the section became mixed) in a partitioned section of a mixed dining room at the Brentwood Country Club, a Los Angeles area golf club whose membership includes men and women.

whether membership in a particular private association merits constitutional protection. Thus, regardless whether a club could demonstrate that it possesses the objective characteristics found constitutionally significant by this Court, Local Law 63 would strip the members of all constitutional protection if the club meets the arbitrary tripartite test. Local Law 63 violates the Constitution because it forecloses the careful assessment of objective characteristics that this Court found essential in determining the limits of state authority over an individual's freedom to enter into a particular association.

D. The Tripartite Test Created by Local Law 63 Is Arbitrary and Completely Inadequate as a Means of Determining Whether the Relationships Between Members of a Particular Private Organization Are Among the Class of Relationships Which Warrant Constitutional Protection

Appellees attempt to rehabilitate Local Law 63 by arguing that the criteria

set forth in the law are consistent with the factors used in Roberts and Rotary. Motion to Dismiss or Affirm at 20-21. As discussed above, however, Local Law 63 precludes the assessment of virtually all of the factors considered by the Court in those cases. Moreover, a review of the three criteria which Local Law 63 allows to be considered demonstrates the law's fundamental inadequacy as a test of whether the relationships between members of a particular club are among the class of relationships meant to be protected from state interference by the constitutional right of private association. None of the factors address the central facet of a truly private club which distinguishes it from public accommodations -- the club's plan or purpose of exclusiveness. See, e.g., Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 438-439

(1973); Sullivan v. Little Hunting Park, 396 U.S. 229, 236 (1969). These cases and their progeny have delineated principles for distinguishing between private associations and public accommodations which should not be disregarded by an impatient and intemperate legislative action.

The first prong of the tripartite test requires that a club have more than 400 members. While the size of a club's membership has been considered in previous cases, there is no precedent to support the arbitrary choice of a specific number of members beyond which a private organization will not be considered worthy of constitutional protection.^{15/} Size, like

^{15/} The arbitrariness of the 400 member limit is highlighted by a comparison of that criterion with the size criterion in some of the similar ordinances recently passed or under consideration in other cities. The Los Angeles, Chicago, and San Francisco Ordinances employ a limit of 400
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all factors considered by the Court, is relative. The size of a club cannot be considered apart from a particular club's purposes, membership policies, and practices. ^{16/} Many clubs with more than 400 members have maintained an atmosphere of social congeniality as a result of membership policies which only allow

members. The District of Columbia Ordinance provides a 350 member limit. The Philadelphia Bill sets the limit at 200 members. Finally, the Buffalo Ordinance draws the line at 100 members. This variety of membership limits makes it clear that a club's geographical location will determine the scope of constitutional protection afforded the associational rights of the club's members, unless the tripartite test in Local Law 63 is struck down. This absurd situation is the natural result of a law which conditions constitutional protection on an arbitrarily selected membership limit.

^{16/} The diversity of membership policies and practices of CONPOR's member organizations demonstrates the need for an individualized determination. No single model applies to all private organizations; no single policy or practice should be weighted more than any others. Each organization must be examined in light of its own characteristics and circumstances in determining whether it is a private organization the members of which merit protection by the constitutional right of private association.

admission of candidates with preexisting close relationships to several club members.

Typically, a candidate must be invited to join a club. ^{17/} This invitation is not extended until the club has completed a rigorous screening of the candidate. In most clubs, a candidate must be nominated by a club member and the nomination must be seconded by other members. Some clubs do not allow members to nominate someone with whom they have a business relationship. Then, based upon information about the candidate provided by club members, a subcommittee of the club determines whether to provide the candidate with an extensive questionnaire

^{17/} The selection process described herein is typical of the selection processes employed by private social clubs. See, e.g., Affidavit of Shepherd, supra note 5 (describing the selection process of the Union League Club in New York City).

which probes into areas such as the candidate's family background, education, profession, activities, interests, and friendships with other members of the club. The questionnaire must be supported by letters from other members of the club who personally know the candidate.

After a careful review of this information, interviews with the candidate, and receipt of comments from club members, the club members (or an elected committee) vote on whether to extend an invitation of membership to the candidate. The candidate must be approved by nearly all the voting members. This rigorous nomination and screening process assures that a new member is compatible with existing members and that common beliefs and values are shared between new and old members. Under Local Law 63, these screening practices and policies of

highly selective private clubs are not even considered.

The second criterion, whether a club "provides regular meal service," is immaterial and if applied would actually support, not detract from, the private nature of a club. To "break bread" with another is an intimate experience which one does not share with the general public. Indeed, nowhere does one have meals more regularly than in one's own home, the very epitome of privacy. Many club members dine at their club more regularly than at any place other than their homes. Much of the fraternalism and camaraderie of a club comes from the opportunity it provides its members to relax and converse with friends over a meal. To use this aspect of private club life as one of the elements which makes a

club a place of public accommodation is a disturbing reversal of logic. 18/

The third and final criterion, whether a club "regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business," is misfocused and irrelevant. First, the fact that some club members may occasionally entertain business associates at the club does not in any way affect the private nature of the club. The private status of a club is defined by the nature of the relationships between club members. If these relationships between members demonstrate that the club is private, the source of an individual

18/ The inappropriateness of using the provision of meals as a criterion is underscored by the fact that it was not even mentioned as a relevant factor by the Court in Roberts or in Rotary.

member's payments, the identity of a his guests, or the topics of his lunch time conversation are irrelevant. 19/

The fact that a few members may use the club to advance their own business interests should not forfeit the constitutionally protected associational rights of all the other members. The following observation of the court in Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis Int'l is directly on point:

The fact that individual members may use their membership in a club to

19/ The criterion also errs in focusing on the location where a member entertains business associates. Clubs do not hold a monopoly on desirable dining or recreational facilities. One can share a meal or a drink with a business associate at one's club, home, or in a public restaurant, hotel or bar. If a person invites a business associate to his home for a meal, or even a drink, that host is paying for his guest's meal or beverage. Surely this does not forfeit the host's right to privacy in his home. There is no more reason to say that similar conduct in a person's private club, which many regard as a kind of second home, should forfeit the member's right of privacy in his club.

further their own business interests does not, in any way, change the avowed purposes of the organization, or convert it into a commercial club.

There can be no doubt that membership in a golf club, for example, may be used by some members to promote business connections and that certain employers of such members might even pay their dues. It is also conceivable that there are some who join a charitable or religious organization and become active therein, because of possible selfish or commercial benefits. Should the activities or motives of some individual members be sufficient to convert such organization itself into a commercial enterprise?

83 Misc. 2d 1075, 1078 (Sup. Ct. 1975), aff'd, 52 A.D.2d 906 (2d Dep't 1976), aff'd 41 N.Y.2d 1034, cert. denied, 434 U.S. 859 (1977). ^{20/}

The private nature of a club is similarly unaffected by nonmember reim-

^{20/} See also Kiwanis Int'l v. Ridgewood Kiwanis Club, 806 F.2d 468, 478 (3d Cir. 1986) (Adams, J. concurring), cert. dismissed, 56 U.S.L.W. 3167 (Sept. 1, 1987) (fact that employers often pay dues of employee members not dispositive in determining whether association is "distinctly private").

bursement of a member's club expenses. ^{21/} The source of a member's payments is irrelevant to an inquiry into the relationships between members of the private club. Appellees argue that if a club receives funds from nonmembers in furtherance of the nonmembers' business interests, the club should be seen as "supported by and operated for the public, business benefit of outsiders to the organization." Motion to Dismiss or affirm at 23. Appellees then argue that

^{21/} Local Law 63 does not require that the member be reimbursed for the business expense. As defined by the regulations of the New York City Commission on Human Rights, the third criterion is satisfied by "payment by a member" for expenses incurred by or for a nonmember in furtherance of business or trade. New York City Commission on Human Rights, Regulations, Unlawful Discriminatory Practices in Institutions, Clubs, or Places of Accommodation Which Are Not Distinctly Private, § 1c (Eff. date August 1, 1985). Hence, a private club can be deemed a public accommodation under Local Law 63 even if it never receives a single payment directly or indirectly from a nonmember in furtherance of business or trade.

"[t]he club is not constitutionally selective or exclusive because, as a regular course of its business, it provides club benefits to and is financially supported by nonmembers of the organization who have never been screened or selected for membership." Id.

Appellees' arguments are illogical. First, an employer may pay for the club dues of an employee, not because the employer sees a business benefit, but simply as a perquisite of employment. In such a situation, the club is not operated for, nor beneficial to, the business interests of the nonmember employer.

Second, even if it were established that an employer reimbursed an employee for club dues because the employer perceived a business advantage in having its employee be a member of a private club, the appellees' position is no

stronger. By sending payments to a club, or reimbursing a member for expenses incurred at the club, a nonmember does not gain any role in operating the club. Similarly, the exclusivity of the club is unaffected. Nonmembers have none of the privileges of membership; they can not vote, hold office, attend meetings, or even walk in the front door of the club except as guests when accompanied by a member. Private clubs are formed and operated by the members and for the benefit of the members only.

Finally, payment by a nonmember (or through a member) of an expense incurred at the club by the nonmember is irrelevant to the private nature of the relationships between club members. 22/ Virtually no

22/ Some members of CONPOR, it should be noted, do not permit their facilities to be used by anyone but members and their accompanied guests, a policy which clearly does not seek public support or participation.

club when renting a part of the club facilities to a nonmember group or individual applies its membership policies to nonmember use of the rented property. Women can and do attend meetings and functions which take place in rooms rented from private clubs which maintain an all-male membership, just as men attend functions at all-female membership clubs.

The appellees fail to explain how the rental of a meeting room for nonmember use has any affect on the private nature of the relationships between the members of the private club. The nonmembers are not given any rights of membership, they are simply allowed to use the rented facilities during the specific period of rental. The nonmembers are not permitted to roam the unrented portions of the facilities and socialize with members.

It beggars common sense to imagine that a private organization or individual forfeits its right to privacy simply because it may receive some revenue from the rental of space that is not then being used for purposes of the organization or individual. If this principle is permitted to stand, it follows inevitably that a homeowner who rents some rooms in his home or an apartment over his garage would lose the right to privacy in his own home. Some clubs do, in fact, own property that is not part of the club premises proper, and other clubs have large clubhouses that contain more rooms than the club normally uses and that thus permit the club to gain some additional revenue by rental of such space when not in use for club purposes. There is simply no logical connection between such practice and the issue of whether an

organization can be considered truly private.

In sum, Local Law 63 must be struck down because the tripartite test that it establishes is arbitrary and inaccurate, and because it specifically precludes the "careful consideration" of "objective characteristics" which this Court has stated is necessary in order to determine the limits of state authority over an individual's freedom to enter into a particular association.

II. LOCAL LAW 63 VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FEDERAL CONSTITUTION BECAUSE IT DENIES TO MEMBERS OF CERTAIN PRIVATE ORGANIZATIONS THE PROTECTION OF THE CONSTITUTIONAL RIGHT OF PRIVATE ASSOCIATION ON THE BASIS OF AN INACCURATE, IRREBUTTABLE PRESUMPTION WHICH IS NOT NECESSARY OR PRECISELY TAILORED FOR THE ATTAINMENT OF A COMPELLING GOVERNMENTAL INTEREST

Local Law 63 sets forth the criteria by which the City of New York determines which organizations are "not distinctly

private," and thus unprotected by the right of private association from governmental interference in their membership and operational policies and practices. Because the right of private association is "a fundamental element of liberty protected by the Bill of Rights" (Rotary, 55 U.S.L.W. at 4608), Local Law 63 must withstand strict judicial scrutiny under the equal protection clause of the fourteenth amendment. See, e.g., Plyler v. Doe, 457 U.S. 202, 217 n.15 (1982) ("In determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein.")

Accordingly, New York City must demonstrate that the classification established by Local Law 63 is necessary

to effectuate a compelling governmental interest. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 634 (1969) ("any classification which serves to penalize the exercise of that right [a constitutional right], unless shown to be necessary to promote a compelling governmental interest is unconstitutional").

The law also must be precisely tailored so as to constitute the least restrictive means of effectuating the compelling state interest. See Attorney General of New York v. Soto-Lopez, 54 U.S.L.W. 4661, 4664 (1986) (If there are other, reasonable ways to achieve a compelling state purpose with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose less drastic means.); Plyler v. Doe, 457 U.S. at 216-217 ("With

respect to such classifications [those that disadvantage a suspect class or that impinge upon the exercise of a fundamental right], it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.")

Two cases in which this Court struck down statutory irrebuttable presumptions which impinged on the exercise of fundamental rights are illustrative of the application of equal protection principles to the present case. First, in Carrington v. Rash, 380 U.S. 89 (1965), the Court struck down a provision of the Texas Constitution which prohibited servicemen living in Texas who were not residents of Texas at the time of their induction from voting in any state election during the

period of service. Having found that some servicemen were bona fide residents, that "more precise tests," id. at 95, were available to distinguish members of this latter group, and that the right to vote is "close to the core of our constitutional system," id. at 96, the Court held that "[b]y forbidding a soldier ever to controvert the presumption of nonresidence, the Texas Constitution imposes an invidious discrimination in violation of the fourteenth amendment." Id.

Similarly, in Stanley v. Illinois, 405 U.S. 645 (1972), the Court struck down as violative of the equal protection and due process clauses of the Federal Constitution Illinois' irrebuttable statutory presumption that all unmarried fathers are unqualified to raise their children. Because of that presumption, the statute allowed the State, upon the

death of the mother, to take custody of all such illegitimate children, without providing any hearing on the father's parental fitness. The Court first recognized that "The rights to conceive and to raise one's children have been deemed 'essential', 'basic civil rights of man.'" Id. at 651 (citations omitted). The Court then stated that it may be "that most unmarried fathers are unsuitable and neglectful parents But all unmarried fathers are not in this category; some are wholly suited to have custody of their children." Id. at 654. Hence, the Court held that the State could not conclusively presume that any individual unmarried father was unfit to raise his children; rather, the state was required by the due process clause to provide a hearing on

that issue. ^{23/} Furthermore, because the statute denied to unmarried fathers a hearing which it extended to all other parents whose custody of children was challenged, the Court held that the State denied unmarried fathers the equal protection of the the laws guaranteed by the fourteenth amendment. Id. at 649.

^{23/} Similar to the law struck down under the due process clause in Stanley, Local Law 63 creates an irrebuttable presumption which impinges on the exercise of fundamental rights, is not necessarily or universally true, and is not the only reasonable means of effectuating the legislative goal; hence, Local Law 63 violates the due process clause of the fourteenth amendment. See Stanley 405 U.S. at 654. See also Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (Regulations employing irrebuttable presumptions which impinge on the fundamental right to bear children, are not necessarily true, and are not the only means to meet the legislative goal were struck down as in violation of the due process clause of the fourteenth amendment).

The Court's decision in Weinberger v. Salfi, 422 U.S. 749 (1975) does not require a different result. In that case, the Court expressly distinguished Stanley and LaFleur, stating that, unlike the claims involved in those cases, the claim involved in Salfi (a noncontractual claim to receive funds from the public treasury) "enjoys no constitutionally protected status." 422 U.S. at 772.

The equal protection principles in Rash and Stanley apply to the present case. Local Law 63 carves out of the general class of private organizations, a subclass -- private clubs that meet the tripartite test -- which is irrefutably presumed to be "not distinctly private," and thus, not worthy of the protection of the right of private association. Other organizations are not subject to such an irrebuttable presumption; they are allowed to present, and the New York Human Rights Commission is allowed to consider, all facts relevant to whether the organization is distinctly private and thus protected by the right of private association. This discrimination against members of private clubs which meet the tripartite test of Local Law 63 should be struck down as a violation of the equal protection clause of the fourteenth amendment because the

classification is not necessary to effectuate the City's objective to eliminate discrimination in places of public accommodation, nor is the law precisely tailored to effectuate the legislative purpose by the means least restrictive of constitutional rights.

As discussed in Argument I, the classification enacted by Local Law 63 not only fails to distinguish adequately those clubs involving relationships which merit constitutional protection from those which do not merit such protection, the law actually precludes the New York Human Rights Commission from considering the objective characteristics necessary to properly make this distinction. Clearly, New York City has not taken care to precisely tailor Local Law 63 so as to to effectuate its declared purpose in the manner which is the least restrictive of constitutional rights.

The City could have easily chosen other less restrictive means to effectuate the legislative purpose. For example, the City could conduct a hearing consonant with the method of determination in Roberts and Rotary in which all the relevant objective characteristics are carefully considered. New York City could also follow the procedure of the Equal Employment Opportunity Commission in determining whether an organization qualifies as a bona fide private membership club exempt from Title VII coverage pursuant to the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000a(e) (1982). ^{24/} These alternate means would

^{24/} The Commission makes a case-by-case determination considering all relevant factors which bear on whether an organization is (i) a club in the ordinary sense of the word, (ii) is private, and (iii) requires meaningful conditions of limited membership. The Commission set forth as factors it would consider, inter alia, the following:

(CONTINUED)

not only achieve the law's purpose of preventing discrimination in associations which are not distinctly private, they would do so without trampling on the associational rights of members of benevolent, charitable, fraternal, sororal and social clubs. 25/

(1) the extent to which it [the organization] limits its facilities and services to club members and their guests;

(2) the extent to which and/or the manner in which it is controlled or owned by its membership;

(3) whether and, if so, to what extent and in what manner it publicly advertises to solicit members or to promote the use of its facilities or services by the general public;

(4) the size and the existence of limitations on the size of the organization;

(5) the membership eligibility requirements.

Equal Employment Opportunity Commission, Policy Statement: Bona Fide Private Club Exemptions (Signed July 22, 1986), EEOC Notice Number N-915 (July, 1986).

25/ It is unlikely that these alternatives would entail significant additional costs to the City, because the New York City Human Rights Law already
(CONTINUED)

The City's interest in irrefutably presuming that a club is not distinctly private on the basis of only the three factors in Local Law 63, rather than undertaking a careful consideration of all the relevant objective criteria, is at most a matter of administrative convenience. But, as the Court pointed out in Stanley, administrative convenience is an insufficient state interest to justify an irrebuttable presumption where other reasonable methods of determination exist. 405 U.S. at 658. In particular, when the City is deciding an issue of constitutional significance, i.e., whether membership in a particular club involves the class of intimate relationships meant to be protected from state interference by the Constitution, the interest of the

provides for an individualized hearing at which evidence is presented.

State in administrative convenience is dwarfed by the fundamental right of club members to a fair opportunity to present and have considered relevant evidence relating to this constitutional determination.

In sum, Local Law 63 violates the equal protection and due process clauses of the Federal Constitution because it enacts an inaccurate, irrebuttable presumption which impinges on the right of private association, and which is neither necessary to effectuate the legislative purpose, nor the means least restrictive of constitutional rights.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals of the State of New York and declare that Local Law 63 is unconstitutional.

Respectfully submitted,

THOMAS P. ONDECK
Counsel of Record
BRADLEY L. JOSLOVE

BAKER & MCKENZIE
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 298-8290

Attorneys for Amicus Curiae
The Conference of Private
Organizations

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AMICUS CURIAE

BRIEF

(9)
No. 86-1836
In the Supreme Court
of the
United States

October Term, 1987



New York State Club Association, Inc.,
Appellant,

vs.

The City of New York, et al.,
Appellees.

On Appeal from the Court of Appeals
of the State of New York

BRIEF OF AMICI CURIAE FRANCISCA CLUB,
TOWN AND COUNTRY CLUB, AND THE FAMILY
IN SUPPORT OF THE POSITION OF APPELLANT

William I. Edlund
Michael H. Salinsky
Counsel of Record
Kevin M. Fong
225 Bush Street
Mailing Address P.O. Box 7880
San Francisco, CA 94120
Telephone: (415) 983-1462

Counsel for Amici Curiae
Francisca Club, Town and
Country Club, and
The Family

Pillsbury, Madison & Sutro
225 Bush Street
Mailing Address P.O. Box 7880
San Francisco, CA 94120

Of Counsel

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IN SUPPORT OF THE POSITION OF APPELLANT

The Francisca Club, Town and
Country Club, and The Family respect-
fully submit this brief as amici curiae
in support of the position of appellant
New York State Club Association, Inc.

INTEREST OF AMICI CURIAE

Amici curiae are three private
social clubs in San Francisco,

California. The City and County of San Francisco recently adopted an ordinance modeled after Local Law 63 of the City of New York; if applied to amici curiae, the ordinance will violate the freedom of association of the members of amici curiae. Moreover, the mere threat of attempts by the City to apply the ordinance to amici curiae will have a chilling effect on the private, social activities and operations of amici curiae.

The Francisca Club, founded in 1904, is a private club of 425 women residing in the San Francisco Bay Area.¹ Its members are chosen by a highly selective process; potential members must be known socially and recommended by at least 10 members. New members are

¹ The club also has approximately 120 non-resident or junior members.

carefully selected for their ability to get along with existing members. Membership is limited to 500 resident members; approximately 20 new members are admitted each year. The purpose of the club is social--members and their guests are strictly prohibited from conducting business in the club's facilities, or even by the club's telephones. Guests may use the club's dining facilities only if invited by and accompanied by a club member. The club's activities center around luncheons at the club--members and their guests socialize in a casual atmosphere in the club's dining room.²

The Town and Country Club is a private club of 560 women who reside in

² The club has three guest rooms that may be used overnight by guests and by members of certain other clubs elsewhere in the United States.

the San Francisco Bay Area.³ Its members are chosen by a highly selective process that can last up to a year; potential members must be known socially and recommended by at least 12 members, as well as several members of the Admissions Committee and Board of Directors. Membership is limited to 750; approximately 15 to 20 new members are admitted each year. Factors taken into consideration in selecting new members include social background, and charitable and community activities. As with the other amici clubs, the Town and Country Club is a purely social club. The club prohibits members from conducting business or holding business meetings at the club; in fact, club facilities may not be used for any

³ The club has approximately 120 non-resident, junior, or life members.

meetings unrelated to club affairs. Members may invite guests to accompany them to lunch at the club, but often a member will come to the club by herself and join other members at common tables. The club is designed to be a "home away from home" for its members.

Finally, The Family, founded in 1902, is a private club of approximately 600 men dedicated to the arts. The members are a close-knit group of men who participate in the arts in a men-only environment. The Family's artistic activities take place in its San Francisco clubhouse and at The Farm, a rustic, private camping area outside of San Francisco. Like other amici, The Family takes all measures necessary to ensure privacy of its members. All of The Family's musical and dramatic performances are closed to the public--guests may attend the activities at The

Farm only if invited and accompanied by a member, and approved by the Board, and The Family's activities in its San Francisco clubhouse are restricted to members or, for a few special events when permission is granted, a limited number of guests. The Family's activities include monthly performances by members in its City Club, as well as numerous encampments at the Farm, where members participate fully in concerts, musicals, theatrical productions and other artistic activities. Accordingly, The Family carefully selects members who will participate in its artistic activities and join in the male fellowship and camaraderie. Potential members are screened in a highly selective process. As with the other amici clubs, applications are not accepted from the public; instead, a potential member must be sponsored by a member, recommended by

additional members, and approved by a Membership Committee and the Board of Directors.

SUMMARY OF ARGUMENT

Local Law 63 and similar ordinances are direct intrusions by government into the membership policies of private clubs, and clearly violate the freedom of association of club members. There are hundreds of private social clubs throughout the country, such as amici curiae, that are bona fide private clubs. These clubs have strictly selective membership policies, purely social purposes, policies prohibiting business activities in the clubs, and private, congenial atmospheres--all of the attributes that are critical in determining whether a club's activities and relationships are protected by the freedom of association

(Roberts v. United States Jaycees (1984) 468 U.S. 609, 620). Nevertheless, Local Law 63 attempts to regulate a private club's membership, regardless whether the club and its activities are truly private under the Roberts criteria. Amici curiae are paradigms of the truly private social clubs protected by the freedom of association; nevertheless such clubs are potentially public accommodations under Local Law 63 because they serve lunch and have more than 400 members.

The third prong of Local Law 63--whether a club regularly receives payment from or on behalf of nonmembers for furtherance of trade or business--is irrelevant to the constitutional inquiry under Roberts. The ultimate test under Roberts, and this Court's subsequent opinion in Board of Dirs. of Rotary Intern. v. Rotary Club

(1987) ___ U.S. ___, 107 S.Ct. 1940, is whether a club's membership and activities are truly private, exclusive, and closed to the public--not whether a particular club member's activities in a club's private setting can be characterized as "in the furtherance of trade or business."

No matter how strictly a private club prohibits business activity, Local Law 63 erroneously presumes that a club is a place of public accommodation if payments are made "directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business." Private social clubs can prohibit and have barred payments from nonmembers, and many clubs have also taken measures to ensure that they do not receive payments indirectly from nonmembers. But it is virtually impossible for a club to ensure that

payments are not made "on behalf of nonmembers for the furtherance of trade or business." For example, under Local Law 63, a club would no longer be private if a member, for his or her own business reasons, decides to invite a business colleague or client to lunch at the club for a purely social lunch conversation. Under Local Law 63 the member's payment of the lunch bill would be a payment "on behalf of a nonmember" (Regulation, § 1(c)), and the social lunch would be "for the furtherance of trade or business" (Regulation, § 1(d)). The practical implications for private social clubs are frightening: In order to comply with Local Law 63 and similar ordinances, clubs will be forced, at their peril, to pry into the motives and social habits of club members-- clubs will be forced to interrogate members on the identity and profession of guests

invited to the club and the members' motives for inviting those guests. The chilling effect on the private, social activities of private clubs is self-evident.

ARGUMENT

I. LOCAL LAW 63 AND SIMILAR ORDINANCES VIOLATE THE FREEDOM OF ASSOCIATION OF MEMBERS OF PRIVATE SOCIAL CLUBS.

Affirmance of the judgment below would give states and local governments carte blanche to destroy the freedom of association of club members by intruding into the selection of club members--one of the most private aspects of a private club. This Court has always recognized "the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as

he chooses" (Evans v. Newton (1966) 382 U.S. 296, 298).

It is important to note that Local Law 63 and similar ordinances are not directed at "business clubs" or nationwide organizations. These ordinances are applicable to local clubs that are truly private, non-commercial associations formed for social purposes. This Court has sustained government regulation of the United States Jaycees, a nationwide organization whose chapters are "large and basically unselective groups" (Roberts v. United States Jaycees (1984) 468 U.S. 609, 621), and of Rotary Clubs, which "rather than carrying on their activities in an atmosphere of privacy, seek to keep their 'windows and doors open to the whole world'" (Board of Dirs. of Rotary Intern. v. Rotary Club (1987) ___ U.S. ___, 107 S.Ct. 1940, 1947). The United

States Jaycees and Rotary Clubs, however, stand in sharp contrast to bona fide private social clubs, such as amici, that have extremely selective membership policies, whose facilities and activities are closed to the public, and whose purposes are social rather than commercial.

The freedom of association protects personal relationships "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship" (Roberts v. United States Jaycees (1984) 468 U.S. 609, 620). The key factors include "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent" to a particular association (468 U.S. 620).

Nevertheless, Local Law 63 attempts to regulate the membership of private clubs that meet the Roberts criteria. Amici curiae are typical of the truly private non-commercial social clubs that are protected by the freedom of association: The number of members is limited by the by-laws of each club. The purpose of each club is strictly social. The clubs prohibit business activities at club functions. Members are chosen by a highly selective process. And each club has its own private, intimate atmosphere of friendship among members.

The private, social activities of amici curiae and similar clubs are clearly at the protected end of the spectrum of personal associational relationships. Yet, Local Law 63, if applied to these clubs, would intrude upon the right of club members to choose

their friendships and personal relationships with other members.

The drafters of Local Law 63 apparently presumed that a club with more than 400 members cannot be "private." Yet in private social clubs such as amicus curiae, it is not uncommon for a member to be socially acquainted with virtually all the other members through club social activities. A truly private social club, regardless the number of members, bears no resemblance to a business or public accommodation.⁴

Moreover, the drafters of Local Law 63 apparently presumed that a

4 In Bohemian Club v. Fair Employment and Housing Commission (1986) 187 Cal.App.3d 1, appeal dismissed (Oct. 5, 1987) __ U.S. __, 56 U.S. Law Week 3241, for example, the court noted that in a 2,000-member club "the consequent relationship among members is undoubtedly 'intimate' in associational terms" (187 Cal.App.3d 13).

club that serves meals cannot be private. Nothing could be further from reality. At many private social clubs, the socializing among members centers around the club's dining activities. Members often come to the club for lunch specifically to meet and socialize with other members; club activities are frequently planned during, or just before or after, lunch so that members will have ample time to meet with each other. Meal times are a critical part of the club's private, social activities.

Finally, the drafters of Local Law 63 apparently presumed that a club cannot be private if payments are made from or on behalf of nonmembers for furtherance of trade or business. But under Roberts and Rotary Club, a private social club is protected by the freedom of association so long as it is truly

private--with exclusive membership and activities closed to the public. Members may have various non-commercial reasons for joining and participating in a private social club--to socialize with friends, to join in activities around a common interest, or to escape from the professional world of the office. Even if, as the drafters of Local Law 63 apparently presumed, some club members hope to gain business connections by entertaining nonmembers at his or her club, that is certainly not the club's purpose, nor the purpose of the vast majority of club members. The "predominant" purpose and activities of private social clubs are social, not commercial, and are entitled to constitutional protection (see Roberts v. United States

Jaycees (1984) 468 U.S. 609, 635
(O'Connor, J., concurring)).⁵

II. THE APPLICATION OF LOCAL LAW 63 AND
SIMILAR ORDINANCES TO PRIVATE
SOCIAL CLUBS WILL HAVE A CHILLING
EFFECT ON THE PRIVATE, SOCIAL
ACTIVITIES OF THOSE CLUBS.

Local Law 63 and similar ordinances will have a chilling effect on virtually all private social clubs. The critical Local Law 63 provision making a club a place of public accommodation is whether the club "regularly receives payment for dues, fees, use of space, facilities, services, meals or

⁵ As noted by appellant, 52 payments by a single club member or several members may constitute "regular" receipt of payments under Local Law 63, but may be trivial and certainly not "pre-dominant" in relationship to the club's purposes and activities.

beverages directly or indirectly from or
on behalf of nonmembers for the further-
ance of trade or business" (emphasis
added).

Under this provision, virtu-
ally every private social club is
potentially subject to Local Law 63.
Private social clubs often take exten-
sive measures to ensure that their club
facilities and activities are not being
used for business purposes--many clubs
prohibit business conduct of any sort at
the club, refuse to accept direct
payments from nonmembers under any
circumstances, and in some cases
instruct members that they may not be
reimbursed by employers or other nonmem-
bers. Nevertheless, payments are often
made "on behalf of nonmembers"; under
Local Law 63 and its accompanying
regulations, a payment would be made "on
behalf of a nonmember" every time a

member pays for the lunch of a guest at the club.

Thus, in order to ensure that it is not subject to Local Law 63, a club will be forced to determine whether each member's lunch with a guest was "for the furtherance of trade or business." This is virtually impossible. While a club can, as amici do, prohibit members and their guests from displaying business papers or carrying briefcases in the club dining room, such measures alone will not ensure that a member's lunch with a guest is not "for the furtherance of trade or business." For example, a club member may invite a business colleague or client to lunch at the club, engage in a purely social lunch conversation, and yet have a hope (unknown to the club) of eventually conducting business with the guest sometime in the future.

There is nothing insidious in a club member socializing with a guest whose friendship or goodwill may lead to future business relationships. The point is that a club has no practical way of distinguishing that member's lunch from the vast majority of lunches in which members invite guests for purely social purposes, with no intent to nurture a business relationship.

At best, clubs could attempt to ask each member the identity and business position of each guest and the member's motives for inviting those guests, and catalogue that information for governmental review. But such a measure itself would require clubs to inject a business element into their clubs, which now are designed for purely social activities. Local Law 63 would in effect transform a social club into a business club with an inventory of

business data. Clubs should not be put in the position of monitoring the business relationships of their members and their motives in socializing with particular guests. The private, social activities of private, social clubs are exactly that--private and social. Local Law 63 necessarily has a chilling effect on the private, social activities of private clubs. It will intrude upon the membership policies and day-to-day social activities of even the most private of clubs.

CONCLUSION

For the foregoing reasons, the
judgment below should be reversed.

Respectfully submitted,

William I. Edlund
Michael H. Salinsky
Counsel of Record
Kevin M. Fong

Counsel for Amici Curiae
Francisca Club, Town and
Country Club, and
The Family

Pillsbury, Madison & Sutro
Of Counsel

AMICUS CURIAE

BRIEF

MOTION FILED
JAN 6 1988

No. 86-1836.

(P)

Supreme Court, U.S.
FILED

JAN 6 1988

JOSEPH P. STANLEY, JR.
CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1987.

NEW YORK STATE CLUB ASSOCIATION, INC.,
APPELLANT,

v.

THE CITY OF NEW YORK, THE MAYOR OF THE CITY
OF NEW YORK, THE CITY HUMAN RIGHTS
COMMISSION AND THE MEMBERS OF THE
CITY HUMAN RIGHTS COMMISSION,
APPELLEES.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK.

Motion for Leave to File Brief Amicus Curiae and
Brief of the Licensing Board of the City of Boston
Amicus Curiae in Support of Appellees.

BARBARA A.H. SMITH,
DAVIS, ROBINSON & SMITH,
Counsel for Amicus Curiae,
45 Bromfield Street,
Boston, Massachusetts 02108.
(617) 542-8706

19 pp

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ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK.

**Motion for Leave to File Brief Amicus Curiae and
Brief of the Licensing Board of the City of Boston
Amicus Curiae in Support of Appellees.**

The Licensing Board of the City of Boston, Massachusetts hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for appellees has been obtained. The consent of the attorney for appellant was requested but refused.

The interest of the Licensing Board of the City of Boston arises from the fact that the Board has put into effect a new rule prohibiting discrimination by clubs licensed for the sale of alcoholic beverages to members or guests if such club is not distinctly private and employs its facilities and its alcoholic beverages license for commercial purposes. The rule sets out several criteria which may be considered in making the factual determination that a club is not distinctly private and employs its alcoholic beverage license for commercial purposes, including the size of the club to the extent it has more than one hundred members, the provision of regular meal and beverage service and the degree to which the club receives payment for dues, fees, use of services, etc., from members or non-members for the furtherance of trade or business or professional interests.¹ Enforcement of the rule has been stayed pending this Court's decision in the instant case.

In the instant case neither appellee nor appellant has considered, in any depth, the impact of so-called private clubs, the size of which are at issue here, engaged in providing meal and beverage service in conjunction with the Commerce Clause and the ability of the states to regulate such essentially intrastate commercial activity. Therefore, *amicus curiae* requests permission to file a brief containing a more complete argument on this constitutional issue. Consideration of the activities of the clubs at issue, their impact on the Commerce Clause and resultant implication of the police power of the state will, it is suggested, provide a broader background for the Court's decision.

Moreover, the City of New York seeks to enforce an anti-discrimination law against "private" clubs. Amicus, in a more limited manner, merely seeks to withhold liquor licenses from

¹ The full text of the rule is reprinted in the addendum to the attached brief of *amicus curiae*.

those clubs which discriminate and which under the proposed criteria are not "distinctly" private. Therefore, amicus urges that the Court consider these differing circumstances and specifically narrow its decision to the broader type of regulation at issue in the instant case.

Respectfully submitted,

BARBARA A.H. SMITH,
DAVIS, ROBINSON & SMITH,
Counsel for Amicus Curiae,
45 Bromfield Street,
Boston, Massachusetts 02108.
(617) 542-8706

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NEW YORK STATE CLUB ASSOCIATION, INC.,
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CITY HUMAN RIGHTS COMMISSION,
APPELLEES.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK.

**Brief of the Licensing Board for the City of Boston
as Amicus Curiae Urging Affirmance.**

Interest of the Amicus Curiae.

The interest of the Licensing Board of the City of Boston in filing a brief as *amicus curiae* in support of the appellees, the City of New York, et al., is set out in the accompanying Motion for Leave to File and shall not be restated herein.

Summary of the Argument.

I. The criteria established by New York City for identifying those "private" clubs which are not "distinctly private" and are, therefore, subject to anti-discrimination laws are consistent with the criteria and analysis applied by this Court in upholding the constitutionality of Title II of the Civil Rights Act of 1964. New York City appropriately looks to the size and commercial activities of clubs in determining which have so-entered into the realm of commercial and public intercourse as to be subject to governmental regulation. These criteria closely parallel the considerations which guided this Court in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) and *Katzbach v. McClung*, 379 U.S. 294 (1964) (pp. 2-6).

II. State and local government bodies have the power under the Twenty-first Amendment to regulate the commercial distribution of alcoholic beverages on any rational basis. Any ruling by this Court limiting a state's general ability to apply anti-discrimination laws to so-called "private" clubs should not be deemed to affect the state's power under the Twenty-first Amendment (pp. 6-9).

Argument.

I. THE CRITERIA ESTABLISHED BY THE CITY OF NEW YORK, LOCAL LAW 63, IS CONSTITUTIONALLY CONSISTENT WITH THE CRITERIA APPLIED BY THIS COURT IN SIMILAR SITUATIONS.

Reference to the initial decisions of this Court in construing and applying Title II of the Civil Rights Act of 1964 provides the essential framework for decision in the instant case.

New York City has attempted to establish criteria for determining whether an association is distinctly private and, therefore, exempt from anti-discrimination regulations or whether by nature of the size and the commercial activities of the association it falls outside the zone of strictly or distinctly private associations and so sufficiently enters into the commercial zone as to be subject to regulation. Rather than be deemed arbitrary, the criteria or standards posited by New York closely parallel the considerations deemed adequate by this Court in upholding the constitutionality of initial Title II legislation. Consideration of *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) and *Katzbach v. McClung*, 379 U.S. 294 (1964) is essential to this Court's determination of the instant case.

In *Heart of Atlanta, supra*, this Court upheld the constitutionality of Title II as a valid exercise of Congressional power under the Commerce Clause of the Constitution. The Court found that Title II was "carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and peoples, except where state action is involved." *Id.* at 250-251.

In *Katzbach v. McClung, supra*, the Court upheld the constitutional validity of Title II as applied to a particular restaurant, Ollie's Barbecue. Reflection on the analysis applied to bring this family-owned restaurant sufficiently into the realm of interstate commerce so as to justify Congressional regulation proves instructive. The Court found that Ollie's Barbecue was a local restaurant specializing in barbecued meats and home-made pies. It was located on a state highway some distance from an interstate highway and an even greater distance from railroad and bus stations. The restaurant had a seating capacity of 220 customers and employed 36 persons. In the year preceeding the passage of Title II, the restaurant purchased locally approximately \$150,000 worth of food, forty-six per cent of which was meat purchased from a local supplier who had

procured it from out-of-state. While acknowledging that the volume of food bought by Ollie's was insignificant when compared with the total foodstuffs moving in commerce, the Court found, on balance, that Ollie's contribution, taken together with so many other's similarly situated, was "far from trivial." 379 U.S. at 301. Thus, the Court ruled that even a local, family-owned restaurant, which refused to serve food to certain persons, solely on the basis of race, was subject to Congressional regulation to prevent racial discrimination.

Moreover, the Court re-emphasized in *Heart of Atlanta*, *supra*, that "the authority of the Federal Government over interstate commerce does not differ . . . in extent or character from that retained by the states over intrastate commerce." 379 U.S. at 260 (citation omitted). Applying these considerations to the instant case reveals that the criteria posited by New York City does indeed focus primarily on the type and extent of the clubs' commercial activities. Local Law 63 eliminates from exemption to compliance with anti-discrimination laws those private clubs which have:

- (1) more than 400 members;
- (2) provide regular meal services; and,
- (3) regularly receive payment for dues, fees, use of space, facilities, services, meals or beverages, directly or indirectly from or on behalf of a non-member for furtherance of trade or business.

If a club meets these criteria it is no longer covered by the "distinctly private" exemption from the definition of a "place of public accommodation" and is subject to state anti-discrimination legislation.¹

¹ Appellant argues that the regulation is invalid by reason of creating an "irrebuttable presumption" that clubs meeting the established criteria are not

It is submitted that the criteria established by Local Law 63 recognizes that an enterprise cannot simply remove itself from regulation by applying the label "private" or "local" but that size and commercial involvement are objective and determinable characteristics of certain associations. The lines drawn by New York City do not reflect bias or prejudice against any category of person or type of association but merely represent a policy choice by the local governing body that discriminatory practices by larger, commercially involved associations cannot co-exist with a general state policy prohibiting discriminatory practices which extend beyond the truly private realm. "Line-drawing" will necessarily be called arbitrary by those affected, but common sense dictates a sliding-scale which, at some point, must call halt. As Justice Holmes so simply put it:

Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the

"distinctly private" and is, therefore, arbitrary and constitutes a violation of constitutionally protected rights of association, speech and privacy. However, this argument is laid to rest in *Katzbach*. There, it was argued that all restaurants meeting the criteria set out in the Act, "affect commerce" without a provision for a case by case determination that racial discrimination in a particular restaurant affected commerce, and was therefore invalid. The Court rejected the argument, noting that "Congress prohibited discrimination only in those establishments having a close tie to interstate commerce. . . ." *Katzbach v. McClung*, 379 U.S. at 304. Similarly, although the New York law makes no specific reference to impact on commerce, the nature of the criteria established clearly implies that it is the commercial impact of the clubs which is determinate in New York City's attempt to enforce its anti-discrimination laws.

legislature must be accepted unless we can say it is very wide of any reasonable mark.

Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting).

The appellants appear to argue that by virtue of the label "private" no matter how large or commercially involved, they have a constitutionally protected right, by reason of the First Amendment right to free association, to discriminate.

The right to free association is, of course, constitutionally protected but it does not follow that there is a constitutionally protected right to discriminate in other than strictly private affairs. *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984). It is well recognized that the interest of the governing body increases as the indicia of public involvement and public impact of an association or enterprise increases.

In the instant case the larger the club and the greater its "quasi-commercial" activities results in its susceptibility to government regulation. It must be remembered that it is the choice of the individual club to involve itself to whatever extent it chooses in commercial activities which impact to a substantial degree on the general public and thereby subject itself to government regulation.

II. A NARROWLY DRAWN LAW SIMILAR TO LOCAL LAW 63 WHICH WITHHOLDS LICENSING OF THE SALE OF ALCOHOLIC BEVERAGES BY CLUBS WHICH ARE NOT DISTINCTLY PRIVATE AND WHICH PRACTICE INVIDIOUS DISCRIMINATION IS CONSTITUTIONAL.

This Court has recognized that:

[T]he broad sweep of the Twenty-first Amendment has been recognized as conferring something more

than the normal state authority over public health, welfare and morals. . . . [B]y reason of the Twenty-first Amendment, "a state is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders."

California v. LaRue, 409 U.S. 109, 114 (1972), quoting *Hos-tetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 330 (1964).

This Court has also repeatedly recognized that "[i]t is equally well established that a State has broad power under the Twenty-first Amendment to regulate the times, places, and circumstances under which liquor may be sold," even though the regulations in question may infringe upon conduct protected by the First and Fourteenth Amendments. *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 715 (1981), citing *California v. LaRue*, *supra*. See also *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Newport v. Iacobucci*, U.S. 107 S.Ct. 383, 93 L.Ed.2d 334, 339 (1986), and that in the context of the regulation of sale and distribution of alcoholic beverages within its borders, state regulations which limit the sale of alcohol need only further a *rational* state interest. *California v. LaRue*, 409 U.S. at 116.

It is submitted then, that a state regulation which is similar to Local Law 63, which withholds licensing of the sale of alcoholic beverages from clubs which are not distinctly private and which discriminate relative to admission to membership or admission to the premises as a guest, is entirely constitutional, even if this Court is to recognize the "rights" asserted by the appellants as within the ambit of constitutionally protected activities, as long as the regulation is rational.²

²Of course, the regulation must also be constitutionally applied. *Craig v. Boren*, 429 U.S. 190 (1976); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

It is further submitted that where the state laws permitting the sale of alcohol is by license, as in thirty-two states and the District of Columbia (see *Summary of State Laws & Regulations Relating to Distilled Spirits*, Distilled Spirits Council of the United States (25th ed. 1985)), where the state has limited the number of licenses to be allotted (see, e.g., M.G.L. c. 138, § 11 *et seq.*) and where the state legislature has articulated a finding that certain groups of persons have been economically oppressed by invidious discrimination (see, e.g., M.G.L. c. 7, § 40n), that a regulation similar to Local Law 63 which withholds or revokes liquor licenses from those not distinctly private clubs because the licensee practices discrimination against those persons is facially rational.³ Furthermore, the regulation is a constitutional exercise of state power under the Twenty-first Amendment, even if membership in the club itself is found to be a constitutionally protected activity under the rationale of *LaRue*, *supra*, and its progeny.

Moose Lodge No. 107 v. Iris, 407 U.S. 163 (1972) does not limit the ability of the state to regulate the licensing of clubs with discriminatory practices.

In *Moose Lodge*, this Court considered the constitutional claim that Moose Lodge's guest-service practice violated the Fourteenth Amendment. Moose Lodge was a private club. However, *Iris* claimed that the licensing of the club by the Pennsylvania Liquor Control Board amounted to state action in violation of the Equal Protection Clause. Appellee sought an injunction forbidding the licensing until the lodge ceased its discriminatory practices. This Court held that such limited service provided by the state did not in any way encourage

³There is no distinction between a regulation promulgated by an agency properly delegated by the state to oversee licensing the sale of alcoholic beverages and a "state" statute for purposes of an analysis under the Twenty-first Amendment. *Newport v. Jacobucci*, U.S. , 107 S.Ct. 383, 93 L.Ed.2d 334, 339 (1986).

discrimination nor did the attendant regulation of such licensees foster racial discrimination. Therefore, the licensing of the establishment did not generally constitute "state action" for purposes of the Fourteenth Amendment.⁴ However, in the instant case, it is the state or local government entity which seeks to prohibit discrimination by entities which are not distinctly private. *Moose Lodge*, therefore, has no application to the instant case. Nor would it apply to the circumstances in which amicus has sought to withhold a liquor license from establishments practicing discrimination, which by virtue of their involvement in commercial activities are deemed not "distinctly private" under local law. Simply put, a finding that the granting of a liquor license under the particular circumstances of *Moose Lodge* did not constitute "state action" for the purpose of the Fourteenth Amendment does not operate to contravene a state or local governmental body's right under the Twenty-first Amendment to regulate the local sale of liquor. By such regulation the Licensing Board does not seek, nor does it, in fact, interfere with the associational rights of so-called "private" clubs, but merely limits the activities of those clubs in the commercial sale of liquor.

Even were this Court to strike down the broader attempt of New York City to apply anti-discrimination laws to the particular entities involved herein, it is respectfully suggested that the ruling should be narrowly limited so as not to be inferred as to limit state or local authority under the Twenty-first Amendment.

⁴However, a particular regulation of the Liquor Control Board did require that a club licensee adhere to all provisions of its constitution and bylaws. Moose Lodge's constitution and by-laws limited membership, and under later amendment guest privileges, to members of the Caucasian race. In this limited respect the Court found "state action" sufficient to permit the Court to enjoin enforcement of that particular Control Board regulation.

Conclusion.

For the reasons stated herein the judgment of the court below should be affirmed.

Respectfully submitted,

BARBARA A.H. SMITH,
DAVIS, ROBINSON & SMITH,
Counsel for Amicus Curiae
45 Bromfield Street,
Boston, Massachusetts 02108.
(617) 542-8706

Addendum.

**RULE ON CLUBS LICENSED TO SELL ALCOHOLIC
BEVERAGES PURSUANT TO MASSACHUSETTS
GENERAL LAWS, CHAPTER 138**

WHEREAS the City of Boston is the capital city of the Commonwealth and is the primary center of business, professional, and government activity in the Commonwealth, and

WHEREAS the general laws of the Commonwealth provide that the City of Boston shall limit the number of all-alcoholic beverages licenses to not more than 650 such licenses (G.L. c. 138, sec. 17), and

WHEREAS there are currently 57 licenses out of the 650 license quota which are issued to private clubs that are permitted to limit the service of alcoholic beverages to persons who are selected by the clubs as members and guests, and

WHEREAS the said alcoholic beverages licenses are required by the general laws to be issued "with a view only to serve the public need and in such a manner as to protect the common good and, to that end, to provide, in the opinion of the licensing authorities, an adequate number of places at which the public may obtain, in the manner and for the kind of use indicated, the different sorts of beverages for the sale of which provision is made" (G.L. c. 138, sec. 23),

THEREFORE, the Board finds that there is a compelling governmental interest in assuring that such licenses are issued only to serve the public need in a manner to protect the common good and that such licenses are not unduly limited with regard to public access.

WHEREFORE, the Board votes this day that:

No club licensed for the sale of alcoholic beverages to members pursuant to G.L. c. 138 may make any distinction, dis-

crimination, or restriction on account of race, color, religious creed, national origin, sex, or any physical or mental disability or ancestry relative to the admission of any person to membership in the club or relative to the treatment of any member at the club premises if such club is not distinctly private and employs its facilities and its alcoholic beverages license for commercial purposes.

Evidence that a club is not distinctly private and that it employs its facilities and alcoholic beverages license for commercial purposes may include the following:

- 1) The size of the club to the extent that it has more than 100 members.
- 2) The provision of regular meal and beverage service.
- 3) The degree to which the club receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business or professional interests.
- 4) The frequency with which the premises or any part of the premises are used for conferences and meetings sponsored by or on behalf of trade or business or professional enterprises.
- 5) The frequency with which nonmembers are invited to be on the club premises for meal and beverage service, for private functions, or for the use of any of the club facilities.
- 6) The degree to which times are established for members to meet and to associate at the premises without the presence of nonmembers (other than staff).
- 7) The degree to which persons are selected for membership in the club on the basis of trade or business or professional associations or achievement as evidenced by the number of members who are partners, officers, directors, or trustees of trade or business or professional enterprises.

Proviso. Nothing in this rule is intended to prevent a club which is licensed for the sale of alcoholic beverages to members and guests from being selective among individuals in electing persons to membership in the club provided that all persons shall be eligible to be considered for membership in accordance with this rule.

Definitions. For the purposes of this rule, the following definitions shall apply:

- a. "Regular meal service" shall mean the provision, either directly or under a contract with another person, of breakfast, lunch, or dinner on three or more days per week during two or more weeks per month during six or more months per year.
- b. "Regular beverage service" shall mean the provision of alcoholic beverages and/or soft drinks at the club premises for one hour or more on three or more days per week during two or more weeks per month during six or more months per year.
- c. "Payment directly from a nonmember" shall mean payment made to a club by a nonmember for expenses incurred by a member or nonmember for dues, fees, use of space, facilities, services, meals and beverages.
- d. "Payment indirectly from a nonmember" shall mean payment made to a member or nonmember by another nonmember as reimbursement for payment made to a club for expenses incurred for dues, fees, use of space, facilities, services, meals or beverages.
- e. "Payment on behalf of a nonmember" shall mean payment by a member or nonmember for expenses incurred for dues, fees, use of space, facilities, services, meals or beverages by or for a nonmember.
- f. Payment made "for the furtherance of trade or business or professional interests" shall mean payment made by or on behalf of a trade or business or professional organization or

enterprise, payment made by an individual from an account which the individual uses primarily for trade or business or professional purposes, payment made by an individual who is reimbursed for the payment by the individual's employer or by a trade or business or professional organization or enterprise, or other payment made in connection with an individual's trade or business or profession, including entertaining clients or trade or business or professional associates, holding meetings or other trade or business or profession related events.

g. A club "licensed for the sale of alcoholic beverages to members and guests pursuant to G.L. c. 138" shall mean any club licensed pursuant to section 12 or section 14 of said chapter, including clubs licensed to sell malt and wine beverages, clubs licensed to sell all alcoholic beverages, and clubs licensed to sell alcoholic beverages with food, whether on an annual basis or on a short-term basis, whether for seven days per week or for less than seven days per week.

Severability. If any provision of this rule or the application thereof is held invalid, the remainder of this rule shall not be affected by such holding and shall remain in full force and effect.

Effective date. This rule in the same or an amended form shall take effect on November 1, 1987, subject to a public hearing being held on August 10, 1987, to determine whether changes in the language of the rule are warranted.

VOTE OF THE BOARD: July 21, 1987

Andrea W. Gargiulo, Chairwoman

Richard L. Arrington, Commr.

Gerald J. Morrissey, Commr.

AMICUS CURIAE

BRIEF

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No. 86-1836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NEW YORK STATE CLUB ASSOCIATION, INC.,

Appellant,

v.

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF NEW YORK,

THE CITY HUMAN RIGHTS COMMISSION AND

THE MEMBERS OF THE CITY HUMAN RIGHTS COMMISSION,

Appellees.

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

**BRIEF AMICI CURIAE OF THE ANTI-DEFAMATION
LEAGUE OF B'NAI B'RITH AND
THE NEW YORK COUNTY
LAWYERS' ASSOCIATION IN SUPPORT OF APPELLEES**

CONSENT OF THE PARTIES

All parties have consented to the filing of this brief and their letters of consent are being filed with the Clerk of the Court.

INTEREST OF THE AMICI CURIAE

For seventy-five years, the Anti-Defamation League of B'nai B'rith has pursued the objective set out in its charter "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." Towards that end, the Anti-Defamation League has been consistently in the forefront of fighting discrimination and ensuring that all persons receive equal protection under the law.

In support of governmental efforts to eradicate discrimination in clubs, the Anti-Defamation League previously filed an *amicus* brief before this Court in the case of *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, ___ U.S. ___, 107 S. Ct. 1940 (1987). ADL has filed numerous other *amicus* briefs urging the unconstitutionality or illegality of discriminatory laws or practices, e.g., *Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Bob Jones University v. United States*, 461 U.S. 574 (1983); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

The New York County Lawyers' Association ("NYCLA"), one of the largest county bar associations in the United States, is a New York not-for-profit corporation whose membership is composed of more than 10,000 attorneys practicing in all fields of law. Since its founding, NYCLA has been an active force in the promulgation of laws ensuring civil rights, political equality and equal justice. NYCLA was among the first bar associations in the country to admit women since its 1908 charter was gender neutral. Through its Committee on Women's Rights and its Committee on Civil Rights, NYCLA has engaged in numerous activities aimed at eliminating discrimination against women and minorities, including preparing reports, drafting and testifying in support of legislation, and appearing as *amicus curiae* in litigation in both federal and state court.

NYCLA is dedicated to the principle of equal access for women and minorities to clubs and organizations as defined by and provided in New York City Local Law 63. The NYCLA Board of Directors has passed a resolution barring the conduct of NYCLA business at discriminatory clubs subject to Local Law 63. NYCLA supports the right of all persons to join those purportedly "private" clubs where business and professional contacts are made and which represent a traditional avenue for economic and political advancement. For these reasons, NYCLA is vitally interested in the outcome of this case and strongly supports the position of Appellees.

This Court is presented with the opportunity to remove one of the many obstacles faced by women and minorities on their road to

equality by upholding New York City's right to subject nonprivate clubs to its anti-discrimination laws. The Anti-Defamation League believes it is able to bring to these issues before the Court the perspective of a national human rights organization dedicated to safeguarding all persons' civil rights, and the New York County Lawyers' Association provides the reflections of many attorneys in the county in which the statute at issue is applicable. *Amici* therefore respectfully offer this Court their accumulated experience with the issues raised by this case.

QUESTION PRESENTED

Does Local Law 63 comport with the Supreme Court's decisions in *Roberts* and *Rotary* as to what constitutes a private association exempt from public accommodation laws?

STATEMENT OF THE CASE

Amici incorporate the statement of the case as set forth in the Brief for Appellees.

SUMMARY OF ARGUMENT

At issue in this case is the constitutionality of New York City's Local Law 63, which amends the City's public accommodations statute by providing specific guidelines for determining when a social or business club is not a distinctly private club and therefore subject to its public accommodation law. The ordinance's limited reach to business and social clubs with more than 400 members, regular meal service and regular payment from or on behalf of nonmembers does not violate Appellant's First Amendment associational rights.

Local Law 63 comports with this Court's holdings in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, ___ U.S. ___, 107 S. Ct. 1940 (1987), in which the Supreme Court discussed certain factors that are relevant in determining whether an establishment is a private membership association or a public accommodation. Thus, Appel-

lant's argument that the statute violates its members' constitutional freedom of intimate and expressive association is without merit.

The *Roberts* Court identified several factors as being important in deciding whether a right of intimate association exists; these include a club's "size, purpose, policies, selectivity, [and] congeniality" 468 U.S. at 620. A comparison of the terms of Local Law 63 with these factors demonstrates that the ordinance does not restrict the policies or practices of any club which enjoys intimate associational rights since the ordinance reaches only those clubs with more than 400 members in which nonmembers regularly participate through meal service and by payments to the club.

Regarding Appellant's freedom of expressive association, the compelling state interest served by New York City's prohibition against discrimination by clubs used in furtherance of trade or business unquestionably justifies any limited infringement. As in *Roberts* and *Rotary*, Local Law 63 is narrowly tailored and unrelated to the suppression of ideas, and New York City's compelling interest cannot be achieved through means significantly less restrictive of associational freedoms.

ARGUMENT

I. INTRODUCTION AND HISTORICAL PERSPECTIVE

While the right to associate is an important, fundamental right, history has taught us that when the majority and the powerful exclude the minority and the weak, the rejected group suffers.

The New York State Club Association's (hereinafter "Appellant" or "Association") view of history is curiously one-sided; while evoking the past as proof of the importance of the right of individuals to associate to the exclusion of others, Appellant fails to recall that protection of *minorities* was considered vital. Appellant recites Alexis de Tocqueville as "succinctly describing the fundamental importance of the right of association," brief for Appellant at 15, without explaining that de Tocqueville lauded the right to associate because it could protect the minority against the majority, and not

because it also allowed the majority to associate. As de Tocqueville noted further along in the chapter cited by Appellant:

In America the citizens who form the minority associate in order, first, to show their numerical strength and to diminish the moral power of the majority; and, secondly, to stimulate competition and thus to discover those arguments that are most fitted to act upon the majority. . . . Political associations in the United States are therefore peaceable in their intentions and strictly legal in the means which they employ; and they assert with perfect truth that they aim at success only by lawful expedients.

de Tocqueville, *Democracy in America*, at 203 (Vintage Books ed. 1945) (emphasis added).

The history of business and social clubs demonstrates that restrictive membership and guest policies have traditionally excluded racial, ethnic, and religious minorities as well as women. The result of this exclusion—denial of access to social, business and professional leaders of the community, lack of opportunity for career advancement, and stigmatizing discriminatory treatment—has a powerful impact on minorities and women.

Before the 1960's, many clubs were explicit about their exclusionary policy. One New Jersey club in the 1950's required applicants to state that "I am not a member of the Negro or Hebrew race or blood" and each month a newsletter reminded members that the club's by-laws restricted those of "the Negro or Hebrew race or blood." *Rights—ADL Reports on Social, Employment, Educational and Housing Discrimination*, Vol. 1, No. 8, Oct.-Nov. 1957 (hereinafter "*Rights*").

New York has had its share of overtly racist or religiously bigoted clubs. The Lake Placid Club, established in 1895, included the following inscription in its literature and on one of its cornerstones:

No one will be received as a member or guest against whom there is physical, moral, social or race objection, or who would be unwelcome to even a small minority. This excludes all consumptives, or rather invalids, whose presence might injure health or modify others' freedom or

enjoyment. This invariable rule is rigidly enforced: it is found impracticable to make exceptions to Jews or others excluded, even when of unusual personal qualifications.

Rights, Vol. 2, No. 3, June-July 1958. The Lake Placid Club defended its restrictive policy on the grounds that it was a "private club," although it derived a substantial part of its business from conventions, nonmembers frequented the establishment, and it did not have a selective membership process. *Rights*, Vol. 2, No. 3.

Amici do not contest the fact that clubs have served an important function in American political and social life over many years. It is also true that for many years it was assumed without question that clubs could have single sex, single race and/or single religion membership. The right to spend time with whom one wants, and to avoid contact with persons whom one does not want to see, was even given implicit Supreme Court approval in 1896. In *Plessy v. Ferguson*, the Court stated:

The object of the [14th] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.

163 U.S. 537, 544 (1896). With this decision, "separate but equal" gained official sanction. So long as all people were free to create their own associations, this doctrine supported their right to exclude others from such organizations on the basis of race or for any other reason.

The argument that racially segregated facilities are "equal" was rejected by this Court in *Brown v. Board of Educ.*, 347 U.S. 483 (1954):

To separate [children and teenagers] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

347 U.S. at 494. Heralded as the death knell for the "separate but equal" doctrine, *Brown v. Board of Educ.* ushered in a generation of

cases successfully challenging segregated workplaces, transportation facilities, and other areas of business and social interaction as inherently unequal. However, discrimination in purportedly private clubs persisted. These so-called private clubs were frequently the locales for important business and professional dealings and women and minorities were often excluded. In the meantime, many groups who were previously excluded were breaking down barriers to participation in the professional and business worlds.

ADL has continued to monitor private club discrimination since the 1960's.¹ Although explicit statements of racial or religious exclusion have for the most part disappeared, in *Amici's* experience such statements still exist with regard to women. Moreover, numerous recorded episodes demonstrate that many clubs continue to discriminate on the basis of race or religion even though their written policy statements may appear neutral.

A rapidly developing public sentiment, impatient with continuing practices of racial, gender and religious discrimination by clubs and organizations, has led to increased litigation in both state and federal courts against so-called "private" clubs whose membership often includes the business and social leaders of the community. See, e.g., *Burning Tree Club, Inc. v. Maryland*, Mem. Op., Case No. 3108902 (Cir. Ct. for Anne Arundel County July 21, 1987), *app. pending*, — Md. — (Ct. of App.); *Jonathan Club v. California Coastal Comm'n*, Case No. C563602 (Sup. Ct. Los Angeles County, 1985), *app. pending*, — Cal. App. 3d — (Ct. of App., 2d Dist.). There

¹In 1962, ADL conducted a survey to determine the extent of religious discrimination in social clubs. The results were published in *Rights* in January 1962. The survey included 1,152 clubs from 46 states and the District of Columbia (Atlanta, Maine, New Hampshire and Vermont were not represented), 349 of which were city clubs and 803 of which were country clubs. ADL found that 67 percent of the clubs practiced religious discrimination. *Rights*, Vol. 4, No. 3 (Jan. 1962).

Later, ADL surveyed leading athletic clubs across the country to determine whether they maintained religiously or racially restrictive policies. *Rights*, Vol. 7, No. 2 (June 1968). Of the 38 clubs surveyed, only 3 maintained open membership policies with respect to both race and religion.

has also been increased emphasis on corrective legislation at state and local levels. Clubs which discriminate are now faced with a potential withdrawal of tax benefits, liquor licenses, zoning waivers and other legislatively-granted privileges.

Were Appellant's argument to prevail, the end result would be to turn back the clock of integration and to allow clubs that in fact serve a public function to remain as segregated institutions—all under the guise of the right of private association.

II. LOCAL LAW 63 COMPORTS WITH SUPREME COURT PRECEDENT

In evaluating Local Law 63, the Court need not define the outer limits of associational freedoms. Since Appellant has conceded the relevancy of *Roberts* and *Rotary*, the validity of the ordinance can be determined by an examination of these decisions. Such an examination makes it clear that Local Law 63 is a constitutional means of eliminating discrimination against women and minorities. Although Appellant argues that the ordinance goes beyond the guidelines of *Roberts* and *Rotary* in regulating clubs, *Amici* submit that Local Law 63 comports with *Roberts* and *Rotary* and should be upheld based on the Court's reasoning in those cases.

The Association asserts broadly a claim that its member clubs enjoy an unbounded right to freedom of association which is impermissibly burdened by New York City's efforts to eradicate discrimination. The Association is a consortium of "private" clubs and associations, some of which "limit their membership on grounds of, *inter alia*, race, religion, sex or national origin." Brief for Appellant at 4. The Association candidly admits it also includes as members clubs which "practice no discrimination whatsoever." *Id.* Appellant states that its member clubs were formed for a variety of reasons. *Id.* Presumably, the size of the Association's member clubs varies as well, and not all provide regular meal service.

In this challenge to New York City's anti-discrimination ordinance, therefore, this Court is not presented with an association whose characteristics and activities can be readily or accurately described with any degree of specificity. *Cf. Rotary*, 107 S. Ct.

1940 (1987); *Roberts*, 468 U.S. 609 (1984); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). Appellant nevertheless asserts that Local Law 63 violates its member clubs' freedom of association apparently on the strength of its claims that certain characteristics of certain member clubs may fall within constitutionally protected boundaries. The proper focus of First Amendment analysis, therefore, is not on indeterminate characteristics of the Association's member clubs, but rather on the precise terms and limited reach of Local Law 63.

Under this Court's analysis, freedom of association encompasses two distinct areas of constitutional protection: "[A]n individual's choice to enter into and maintain certain intimate or private relationships" and the right to "associate for the purpose of engaging in protected speech or religious activities." *Rotary*, 107 S. Ct. at 1945. Applying this analysis, the Court has upheld against First Amendment challenges the application of Minnesota and California statutes to the discriminatory practices of the United States Jaycees and Rotary International, respectively. *Roberts*, 468 U.S. 609; *Rotary*, 107 S. Ct. 1940. The constitutionality of Local Law 63 is compelled by the application of *Roberts* and *Rotary*.

A. Local Law 63 Does Not Unconstitutionally Infringe Intimate Association Rights

New York City's public accommodation law, which covers all institutions, clubs, or places of accommodation that are "not distinctly private," prohibits discrimination based on race, creed, color, national origin, physical or mental handicap, and actual or perceived sexual orientation. New York City Admin. Code, Title 8, §§8-107, 108 and 108.1. Local Law 63 provides specific guidelines to determine when such an entity is not "distinctly private."² *Id.* at §§8-102(9).

²Under Local Law 63, a club or association is not "distinctly private" if it has over 400 members, if it provides regular meal service and if it regularly receives payment from or on behalf of nonmembers.

Freedom to engage in intimate association affords constitutional protection to only those "highly personal relationships" that involve "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctively personal aspects of one's life." *Roberts*, 468 U.S. at 620. Thus, the limits of intimate association are determined not by subjective or superficial assertions of privacy but rather by a deeper analysis of the characteristics of the relationship.

This Court has recognized intimate association as among the fundamental rights that are "implicit in the context of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937), quoted in *Bowers v. Hardwick*, — U.S. —, 106 S. Ct. 2841, 2844 (1986). In *Roberts*, the Court identified such factors as "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship" as being important in deciding whether a right of intimate association exists. 468 U.S. at 620.

The *Roberts* Court emphasized the limited nature of intimate associational freedom by noting that thus far it has only been applied to marriage, childbirth, raising and educating of children, and cohabitation with relatives. 468 U.S. at 619. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Moore v. East Cleveland*, 431 U.S. 494 (1977). Close review of Appellant's argument reveals no substantive bases for its claim of intimate association on behalf of its member clubs. Comparing the terms of Local Law 63 to the Court's analysis in *Roberts* and *Rotary*, it is apparent that the ordinance is consistent with the Court's holdings in those cases.

Local Law 63 includes regulation of clubs with less than 400 members, consistent with the Court's concern about the "relative smallness" of the membership. *Roberts*, 468 U.S. at 619. Indeed, in *Roberts*, the Court noted that the Minneapolis and St. Paul chapters of Jaycees—those at issue in that case—had approximately 430 and

400 members, respectively. 468 U.S. at 621. Appellant's assertion that the significance of a club's size depends on its location is without merit. A club's size has the same effect on "intimacy" regardless of its geographical location.

A second important factor is the selectivity of the club and the extension of club privileges and services to nonmembers. The Court noted in *Roberts* that nonmembers "regularly" participated in Jaycees' activities, despite their inability to share decisions of control over club functioning. Local Law 63 similarly mandates nondiscrimination only in clubs that regularly provide meal service and regularly receive payment from or on behalf of nonmembers. These are clubs which, by definition, allow nonmembers to enjoy the services and benefits of the facilities. The Association's claim of selectivity is belied by the willingness of its members to extend club facilities to nonmembers for a fee.

Moreover, in its provision relating to reimbursement of fees, Local Law 63 reaches only those clubs and associations that include or offer activities used in furtherance of trade or business. Members thus enjoy benefits of a quasi-commercial nature which, by virtue of involvement by nonmembers, are public as well.

Although Appellant correctly notes that this Court has not mentioned food service or reimbursement as criteria for determining whether a club is private, these factors are consistent with the Court's concerns and reflect New York City's efforts to assert narrowly its power over institutions which most closely resemble the traditional notion of public accommodations, i.e., restaurants and hotels. See Title II, Civil Rights Act of 1964, 42 U.S.C. §2000a; New York Civ. Rights Law §44a (McKinney 1976).

Clubs, such as those at issue in this case, which are neither small nor selective and whose activities, "central to the formation and maintenance of the association involve[] the participation of strangers to that relationship," do not implicate the right of intimate association. 468 U.S. at 621.

B. Local Law 63 Does Not Unconstitutionally Infringe Expressive Association Rights

Freedom of association protects an individual's right to join with others in activities protected by the First Amendment. While not absolute, the right of expressive association protects group activity "in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts*, 468 U.S. at 622-623. Expressive associational rights are premised on the protection afforded individual expression under the First Amendment. *NAACP v. Alabama*, 357 U.S. 449 (1958). Just as First Amendment jurisprudence has placed limits on the constitutional guarantee of free speech, *Brandenburg v. Ohio*, 395 U.S. 444 (1969), associational rights may be subject to narrowly drawn, content neutral "regulations adopted to serve compelling state interests." *Roberts*, 468 U.S. at 623.

The Court has recognized that ensuring access by women and minorities to goods and services otherwise available to the public is a compelling interest justifying limited government regulation of individual conduct. Upholding the validity of the federal public accommodations law, the Court noted the statute's "fundamental objective . . . was to vindicate 'the deprivation of personal dignity' that surely accompanies denials of equal access to public establishments." *Heart of Atlanta*, 379 U.S. at 250. In *Roberts*, recognizing the "stigmatizing injury" of gender discrimination, 468 U.S. at 625, this Court ruled that "Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms." *Id.* at 623. Similarly, in *Rotary*, the Court found that any impact California's Unruh Civil Rights Act may have on sex-segregated Rotary Clubs "is justified because it serves the State's compelling interest in eliminating discrimination against women." 107 S. Ct. at 1947. New York City has a no less compelling interest in exposing and eliminating an institutional barrier to women and minorities attaining equal access to business opportunities and professional advancement.

In *Rotary*, the Court expressly reserved the question of "the extent to which the First Amendment protects the right of individuals to associate in the many clubs and other entities with selective membership that are found throughout the country." 107 S. Ct. at 1947, n.6. Such a determination, the Court noted, "requires a careful inquiry into the *objective characteristics* of the particular relationships at issue." *Id.* (quoting *Roberts*, 468 U.S. at 620) (emphasis added). The "objective characteristics" that the Court relied on in *Roberts* and *Rotary* are reflected by the express terms of Local Law 63.

The three-fold analysis of Local Law 63 setting out the criteria for clubs subject to regulation is "unrelated to the suppression of ideas [and] cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623. As in this Court's analysis of Minnesota's Human Rights Act, Minn. Stat. §363 *et seq.*, Local Law 63 "does not distinguish between prohibited and permitted activity on the basis of viewpoint" and makes no distinction among clubs and associations based on "constitutionally impermissible criteria." *Id.* New York City "has progressively broadened the scope of its public accommodations law in the years since it was first enacted . . . with respect to the number and type of covered facilities. . . ." *Id.* at 624. "Nor is the state interest in assuring equal access limited to the provision of purely tangible goods and services. . . ." *Id.* at 625. New York City "has adopted a functional definition of public accommodations that reaches various forms of public, quasi-commercial conduct." *Id.*

As in *Roberts* and *Rotary*, Appellant "has failed to demonstrate that [the challenged law] imposes any serious burdens on the . . . members' freedom of expressive association," *Roberts*, 468 U.S. at 626, because there is no evidence that admitting women and minorities to New York City clubs "will affect in any significant way the existing members' ability to carry out their various purposes." *Rotary*, 107 S. Ct. at 1947. For the purpose of this inquiry we can assume that these clubs' protected expression encompasses a variety of community, political, cultural, economic and social activities. Local Law 63, if applied, would "not require the clubs to abandon

or alter any of these activities," although it would impose nondiscriminatory membership rules on these clubs. *Rotary*, 107 S. Ct. at 1947.

This Court has noted the lack of protection afforded discriminatory association under the First Amendment:

[A]lthough the Constitution does not proscribe private bias, it places no value on discrimination. . . . Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.

Norwood v. Harrison, 413 U.S. 455, 469-470 (1973), quoted in *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) and *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984).

As this Court found in *Roberts*, construing Minnesota's Human Rights Act, Local Law 63 adopts a "functional definition" of "private club" that reaches a limited number of purportedly "private" extensions of business establishments.

This expansive definition reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups. . . . *Roberts*, 468 U.S. at 626.

CONCLUSION

Local Law 63 is content neutral and narrowly drawn to accomplish New York City's goal of eliminating discrimination in restrictive clubs that advance members' professional careers and business contacts. The ordinance is a reasonable measure taken by the City to ensure all persons access to clubs that function as extensions of the business community. Its prohibition against discrimination falls within constitutional guidelines as set forth by this Court in *Roberts* and *Rotary*.

For the foregoing reasons, the judgment of the New York Court of Appeals upholding the validity of Local Law 63 should be affirmed.

JILL L. KAHN

Counsel of Record

Anti-Defamation League

of B'nai B'rith

823 United Nations Plaza

New York, NY 10017

(212) 490-2525

Attorney for Amici Curiae

Of Counsel

LIVIA D. THOMPSON

JUSTIN J. FINGER

JEFFREY P. SINENSKY

MEYER EISENBERG

Anti-Defamation League of B'nai B'rith

823 United Nations Plaza

New York, NY 10017

(212) 490-2525

AMICUS CURIAE

BRIEF

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On Appeal from the Court of Appeals
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BRIEF OF AMICUS CURIAE CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA

LOUISE H. RENNE
City Attorney
DENNIS AFTERGUT
Chief Assistant City Attorney
GEORGE A. RILEY
Special Assistant to
the City Attorney
400 Van Ness Avenue,
Room 206
San Francisco, CA 94102
(415) 554-6221
Attorneys for Amicus Curiae

January 12, 1988

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Admin. Code of the City of New York, Title 8: § 8-102(9) (Local Law 63)	<i>passim</i>
San Francisco Municipal Code: Article 33B	1, 2, 3

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

NEW YORK STATE CLUB ASSOCIATION, INC.,
Appellant,

VS.

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF NEW
YORK, THE CITY HUMAN RIGHTS COMMISSION AND THE
MEMBERS OF THE CITY HUMAN RIGHTS COMMISSION,
Appellees.

**On Appeal from the Court of Appeals
of the State of New York**

**BRIEF OF AMICUS CURIAE
CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA
THE INTEREST OF THE CITY AND COUNTY
OF SAN FRANCISCO, CALIFORNIA**

On November 12, 1987, the City and County of San Francisco ("San Francisco") enacted Article 33B to the San Francisco Municipal Code (Police Code). Modeled on New York Local Law 63 and the regulations promulgated thereunder, Article 33B prohibits discrimination in the membership policies and practices of clubs that have more than 400 members, serve meals on a regular basis and accept payments in furtherance of business. The full text of Article 33B is set forth in the Appendix to this brief.

Article 33B represents the manifest policy of San Francisco to eliminate the barriers of discrimination that impede the profes-

sional advancement of women and minorities. Adopted by the unanimous vote of the Board of Supervisors, Article 33B joins other ordinances of the City of San Francisco that forbid discrimination in employment, housing and public accommodations. Because the law is directed at large private clubs operating in San Francisco, Article 33B reflects the recognition that membership in such institutions confers a singular opportunity to participate in circles with considerable influence in the community.

The enactment of Article 33B was preceded by public hearings at which the Board of Supervisors received testimony on the importance of private clubs to business and professional careers. The Board of Supervisors found that extensive business and commercial activities are carried on at clubs that appear to have been formed for social or civic purposes. The Board also found that such business activity most frequently occurs and is promoted in clubs with more than 400 members that provide regular meal services. Because business is regularly conducted at such clubs, membership dues and expenses are often paid by employers or deducted by members. Clubs that engage in such practices are not "distinctly private" in their nature but are invested with the critical attributes of other business establishments now subject to public regulation. Because such organizations serve a singular purpose in promoting the business and professional objectives of their members, San Francisco has a compelling interest in eradicating discrimination by such clubs against women and minorities. Accordingly, San Francisco has determined that the interests of individuals in associating with others in clubs that are not "distinctly private" must yield to the broad public interest in securing equal opportunity.

Article 33B, like New York Local Law 63, is a measured and carefully crafted effort to prohibit discrimination by clubs whose activities in promoting business are invested with the same public nature and interests as business establishments now subject to other anti-discrimination measures. Article 33B and Local Law 63 limit their interference in club activities only to proscribe invidious discrimination; these laws do not directly infringe speech or expressive activities, nor do they unduly hinder a club from applying other criteria for membership which serve the

club's purposes. Because both laws are directed at large clubs with substantial business attributes, the measures avoid impermissible infringement of rights to intimate or expressive association.

A decision striking down New York Local Law 63 would raise serious questions regarding the continuing validity of Article 33B. More importantly, such a result would be a critical setback to governmental efforts to advance the compelling public goal of eliminating invidious discrimination in business and public life. Because San Francisco, like all local governments, has a paramount interest in protecting its authority to outlaw such discrimination, this brief *amicus curiae* is respectfully submitted in support of the City of New York.

SUMMARY OF ARGUMENT

In *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, ___ U.S. ___, 107 S.Ct. 1940 (1987) and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Court held that a state's interest in eliminating discrimination and assuring a citizen's equal access to certain goods and services justifies a statutory prohibition of discriminatory practices by private organizations. These decisions, together with a host of legislative enactments and court rulings, mark historic progress in combating the evils of race and sex discrimination. This body of law demonstrates an increasing societal awareness that invidious discrimination harms not only the aggrieved individual but deprives society of valuable human talents, energies and creativity. New York Local Law 63 is a narrowly tailored measure designed to promote these important goals without infringing the associational rights identified in *Roberts* and *Rotary Club*.

Appellant seeks to invalidate Local Law 63 not because of the consequences of a particular application of that law, for there are no such facts before the Court. Rather, Appellant argues that Local Law 63 creates an unconstitutional, irrebuttable presumption that deprives a club of the opportunity to show, by virtue of its particular facts and circumstances, that the First Amendment protects it from the law's ban on discriminatory conduct. In a

related argument, Appellant maintains that the law is impermissibly overbroad because it may interfere with protected expressive activities. Finally, Appellant alleges that Local Law 63 violates equal protection because benevolent and religious organizations are expressly exempt from the law's reach.

Appellant's challenge fails in several respects. The criteria by which a club is determined to be "not distinctly private" reflect the considerations set forth by the Court in *Roberts* and *Rotary Club*. By specifying these criteria, the law avoids the vagueness that has troubled courts with regard to regulatory efforts that may affect interests protected by the First Amendment. Appellant's attempt to turn the specificity of Local Law 63 into an argument that the measure creates an irrebuttable presumption misconstrues the Court's prior holdings in this area. The law's criteria do not constitute impermissible grounds for state regulation, an essential element in laws invalidated as creating irrebuttable presumptions. Indeed, the criteria are compelled by *Roberts* and *Rotary Club*.

In essence, Appellant's objection to the irrebuttable presumption allegedly created by the law is the same as Appellant's overbreadth challenge; namely, that the law may sweep into its ambit associations that the state may not constitutionally prohibit from engaging in invidious discrimination. The extraordinary analysis entailed by an overbreadth challenge is inappropriate because Local Law 63 (1) is not directed at pure speech, (2) regulates conduct as opposed to expressive activity, and (3) advances compelling state interests in a narrow and careful fashion. Even if such an analysis were proper, Appellant fails to show the "real and substantial" overbreadth necessary to invalidate a law having these features.

Finally, Local Law 63 does not violate the guarantee of equal protection. Because Local Law 63 does not directly burden constitutional rights, the law's classifications need only be rationally related to the law's purpose. The exemption of religious and benevolent corporations is rationally predicated on legislative findings that business activity does not frequently occur in those organizations. This exemption, moreover, serves to avoid impermissible state interference with activity protected by the First

Amendment. Therefore, the law does not contravene equal protection.

ARGUMENT

I. LOCAL LAW 63 IS A CONSTITUTIONAL EXERCISE OF STATE POWER RATIONALLY DESIGNED TO SERVE COMPELLING PUBLIC GOALS

It is settled that government has a fundamental interest in eliminating all forms of invidious discrimination that affect the distribution of goods and opportunities in society. Discrimination on the basis of race or sex is an extreme indignity to the individual that serves to entrench existing power structures and ossify the sources of human energy and creativity. As Justice Goldberg wrote in his concurring opinion in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 291 (1964), the primary purpose of civil rights legislation is "the vindication of human dignity." The humiliation and anguish of discrimination is found in the "inability to explain to a child that regardless of education, civility, courtesy and morality, he [or she] will be denied the right to enjoy equal treatment." *Id.* at 292, quoting from S. Rep. No. 872, 88th Cong., 2d Sess., 16. Such repressive discrimination "denies society the benefits of wide participation in political, economic and cultural life." *Roberts*, 104 S.Ct. at 3253.

The state may pursue the compelling goal of eradicating invidious discrimination into the realm of purely private transactions between individuals or groups. Invidious private discrimination has never been accorded "affirmative constitutional protections." *Norwood v. Harrison*, 413 U.S. 455, 470 (1973). Therefore, government may prohibit discrimination by private schools or labor unions. *Runyon v. McCrary*, 427 U.S. 160 (1976); *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945). Even an institution as traditionally collegial and exclusive as a law partnership has no constitutional right to discriminate invidiously in its choice of a partner. *Hishon v. King & Spalding*, 467 U.S. 69 (1984).

Because private discrimination is accorded no constitutional protection, governmental measures forbidding such actions are

restrained only to the extent that such laws infringe the exercise of constitutional rights directly implicated by discriminatory conduct. In this case, Appellant maintains that Local Law 63 will impermissibly interfere with the exercise of certain associational rights derived from the First Amendment. As the Court stated in *Rotary Club*, these rights may be distinguished into two closely related categories: a right to intimate association and a right to expressive association.

First, the Court has held that the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships. Second, the Court has upheld the freedom of individuals to associate for the purpose of engaging in protected speech or religious activities.

107 S.Ct. at 1945. In *Roberts* and *Rotary Club*, the Court examined in detail how the challenged laws would interfere with the exercise of these associational rights. On the basis of the nature and activities of these organizations, the Court determined that the members' First Amendment rights would not be violated by enforcement of the statutes at issue.

Before the enactment of Local Law 63, private clubs in New York were subject to state anti-discrimination laws according to the various factors delineated in *United States Power Squadrons v. State Human Rights Appeal Bd.*, 59 N.Y.2d 401, 452 N.E.2d 1199, 465 N.Y.S.2d 871 (1983). Local Law 63 supplements the state's regulation by specifying three tests which, if met, will subject a club to anti-discrimination prohibitions. A private club that does not satisfy these tests may nevertheless be subject to the state law if other facts and circumstances establish that the club is not "distinctly private." Local Law 63 merely provides that a club which has more than 400 members, regularly serves meals and accepts payments in furtherance of business will be deemed not "distinctly private" and thus subject to the local law's prohibition.

By specifying the criteria by which a club will be regulated as an association that is not distinctly private, Local Law 63 serves important public goals consistent with the constitutional interests identified in *Roberts* and *Rotary Club*. While size is not the only

factor in determining whether an association is sufficiently intimate to merit constitutional protection, it is clear that large groups are not entitled to such protection. Although a state may prohibit discriminatory practices by a club of 100 members, see *Rotary Club*, 107 S.Ct. at 1946, Local Law 63 places the limit at 400 members. This membership limit, together with the requirement that an organization receive regular payments in furtherance of business, ensures that the law will not affect the sort of intimate relationships accorded constitutional protection such as marriage, child rearing and education and cohabitation with relatives. See *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Moore v. East Cleveland*, 431 U.S. 494 (1977) (plurality opinion).

Local Law 63 is also consistent with the expressive aspects of associational rights. The requirements that a club regularly serve meals and accept payments in furtherance of business eliminate from the law's scope those organizations predominately engaged in expressive activities. With regard to organizations that engage in expressive activities as an incident to other non-protected activities, Local Law 63 imposes a neutral restraint that is not directed at the manner or content of expression. The law "imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Roberts*, 104 S.Ct. at 3254.

By specifying the tests that will subject the Club to regulation, Local Law 63 avoids the vagueness that has impaired other statutes that regulate expressive activity. A law that does not provide explicit standards deprives the innocent of fair warning and "impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). The absence of clear standards and the possibility of discriminatory enforcement are especially dangerous when the state attempts to regulate activity protected by the First Amendment. A vague statute discourages a broader range of expressive activity than if the statute were more narrowly drawn to focus on the conduct which government may permissibly regulate. See

Speiser v. Randall, 357 U.S. 513 (1958). A fear of sanctions posed by a vague law inevitably chills protected conduct and impairs the open and full discourse intended to be promoted by the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

The specificity of Local Law 63 avoids the dangers of unconstitutional vagueness. Enforcement of Local Law 63 is vested in a commission that may make factual findings and issue orders requiring clubs to refrain from unlawful discriminatory practices. The standards specified in the law serve to reduce the discretion committed to the commission in bringing enforcement actions. Similarly, the standards give some organizations additional security that they may conduct their operations without running afoul of the law. Although this security is not complete, for as noted above, a small club may nevertheless be subject to state regulation pursuant to the *Power Squadron* factors, Local Law 63 provides important guides so that organizations have notice of whether they fall within the scope of the law.

A. On Its Face, Local Law 63 Does Not Violate The Constitutionally Protected Freedoms Of Expressive And Intimate Association

In both *Roberts* and *Rotary Club*, the Court analyzed how the application of state anti-discrimination laws would affect the members' rights of intimate and expressive association. In each case, the Court considered whether the association had established, on the record, sufficient facts to show that the challenged law would violate its members' First Amendment rights. To determine whether local Rotary Clubs were entitled to the constitutional protections accorded intimate associations, the Court examined particular aspects of the association including size, organization, selectivity and guest policies. *Rotary Club*, 107 S. Ct. at 1946. In *Roberts*, the Court found no violations of the rights to expressive association when there was "no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in [constitutionally] protected activities or to disseminate its preferred views." 104 S.Ct. at 3254. See also *Hishon v. King & Spaulding*, 467 U.S. at 78 ("[R]espondent has not shown how its ability to fulfill [its

expressive] function would be inhibited by a requirement that it consider petitioner for partnership on her merits.")

In this action, there is no record regarding the protected associational or expressive activities of the clubs represented by Appellant. Instead, Appellant invites this Court to engage in a radical departure from *Roberts* and *Rotary Club* by speculating about the consequences of enforcing Local Law 63 against hypothetical clubs. Because Appellant can imagine a club that is not "distinctly private" under the statute but is nevertheless protected from enforcement of the law by the First Amendment, Appellant maintains that the law is unconstitutional on its face. The Court should refuse this invitation to breach longstanding restraints on its power to declare legislative actions unconstitutional.

Implicit in the constitutional directive that federal courts hear only concrete "cases and controversies" is the requirement that the Court determine a matter solely on the facts before it. Thus, a person to whom a statute may constitutionally be applied cannot challenge that measure on the ground that it may be applied unconstitutionally to others under circumstances not presented to the Court. *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). The "speculative and amorphous nature" of reviewing the constitutionality of a statute without the facts of its application in a particular case is a task that violates the "fundamental conception of the Framers as to the proper place of the federal courts." *Younger v. Harris*, 401 U.S. 37, 53 (1971).

As noted above, Local Law 63 clarifies the test for the determination that a particular club is not distinctly private. On its face, therefore, Local Law 63 is a rational exercise of government power consistent with the general guidelines set forth in *Roberts* and *Rotary Club*. Appellant can produce no facts showing how Local Law 63 will interfere with the protected activities of Appellant's member organizations. Nevertheless, Appellant challenges the law on the grounds that it may ensnare unnamed organizations whose activities are constitutionally protected from this form of state interference. Appellant separates this attack into two arguments: first, that the law creates an impermissible, irrebuttable presumption, and second, that the law is overbroad. Together, these arguments amount to the same claim that the law

is invalid because, under certain hypothetical applications, the measure may impermissibly regulate the activities of clubs fully protected by the First Amendment.

Appellant's heavy reliance on the law's alleged creation of an improper, irrebuttable presumption is misplaced. In cases when the Court has struck down a law as creating an irrebuttable presumption, the invalid law deprived an individual of a very important right or interest by concluding, from certain predicate facts, the existence of the ultimate grounds that justify the government's actions. For example, a law prohibiting voting by military personnel improperly presumes that such persons are not *bona fide* residents. While residency is a legitimate ground to deny voting rights, there is no necessary and proper connection between the fact of military service and the absence of such residency. *Carrington v. Rash*, 380 U.S. 89 (1965). Similarly, government may not automatically infer from membership in a communist organization that a person poses a threat to national security and may be deprived of a passport. *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

A legislative scheme that "rests on an irrebuttable presumption often contrary to fact" may lack "critical ingredients of due process." *United States Dep't of Agric. v. Murry*, 413 U.S. 508, 514 (1973). The solution to such a defect is a hearing process designed to enable the individual to establish that the ultimate grounds for the government's regulation are not satisfied. *Stanley v. Illinois*, 405 U.S. 645 (1972) (state may not presume that a father of illegitimate children is unfit for custody; father is entitled to a hearing on fitness).

The doctrine of irrebuttable presumption is peculiarly attached to interests or rights claimed by individuals, not organizations or associations. The particular inequity of such a presumption is that it forces an individual into a factual classification despite all contrary evidence. In *Carrington v. Rash*, a soldier was forever forbidden — even by evidence of the "most positive character" — from showing actual domicile in the state. 380 U.S. at 96. Such a law "viewed people one-dimensionally (as servicemen) when a finer perception could readily have been achieved by assessing a

serviceman's claim to residency on an individualized basis." *Stanley v. Illinois*, 405 U.S. at 655.

As an association of organizations, Appellant can lay no claim to the rights to individual treatment at stake in the Court's decisions striking down laws as resting on irrebuttable presumptions. More importantly, irrebuttable presumptions that violate the constitutional protections of fairness involve predicate facts that could not, standing alone, support the government's action. Predicate facts do not permissibly support the state's action if a regulation based only on such facts would violate other constitutional protections. Denying voting rights to a person simply because he or she is a soldier would violate equal protection; the same result may not be achieved through a *per se* rule that presumes non-residency from military status. Similarly, since government may not punish membership in communist organizations, government may not accomplish the same end by presuming that such membership constitutes a threat to national security. In addition, predicate facts do not permissibly support state action if the facts bear no rational relationship to the proper grounds for legislative action. In other words, there must be a close connection between the predicate facts and ultimate grounds. Thus, the fact of illegitimacy is not closely and rationally related to a conclusive determination that a person is unfit to have custody of children.

In this case, the factual predicate for application of Local Law 63 is derived from the Court's decisions in *Roberts* and *Rotary Club*. These factors do not delineate a classification that the state could not permissibly regulate. Indeed, the three tests closely embody the considerations the Court expressly identified as supporting state regulation of private organizations. Appellant does not quarrel with the particular tests as impermissible or not rationally related to the law's purpose. Rather, Appellant maintains that the criteria are underinclusive because they may be satisfied by an organization that has a constitutional defense to the application of the law. Appellant urges the Court to impose upon New York City the requirement of including, as statutory elements, factors that would tend to prove that a club has no constitutional defense to the law. In this respect, Appellant's

argument is no different than any challenge to a law on the grounds that under certain circumstances it may unconstitutionally interfere with protected activity. Absent extraordinary circumstances, however, the possibility of such unconstitutional application is not enough to invalidate a law on its face. See *Cox v. Louisiana*, 379 U.S. 559 (1965).

Appellant's attack on the law's irrebuttable presumption, therefore, is functionally identical to its overbreadth challenge; namely, the Court is asked to speculate about a club that could satisfy the law but would be constitutionally protected from the law's prohibition. The Court has repeatedly refused to engage in such analysis. "The delicate power of pronouncing a [statute] unconstitutional is not to be exercised with reference to hypothetical cases thus imagined." *United States v. Raines*, 362 U.S. 17, 22 (1960).

Only in extremely limited circumstances has the Court entertained a facial challenge to a statute on the grounds that it may be applied unconstitutionally to situations not before the court. Such an examination occurs only because of the most "weighty countervailing policies." *Id.* at 22-23. The Court has permitted such a challenge where compelling interests protected by the First Amendment necessitated a relaxation of fundamental jurisprudential doctrines. See *Younger v. Harris*, 401 U.S. 37 (1971). These considerations, however, are not present here.

Several factors establish that Local Law 63 is not subject to traditional overbreadth analysis. First, the law is not directed at pure speech. Where a statute imposes sanctions, especially criminal penalties, on speech itself, the law is subject to scrutiny for overbreadth. *Houston v. Hill*, 482 U.S. —, 107 S.Ct. 2502 (1987). Local Law 63 only allegedly interferes with expressive or intimate association in a limited and indirect fashion. Second, the law regulates conduct in a neutral, non-censorial manner. *United States v. Harriss*, 347 U.S. 612 (1954). The law applies without regard to the content of the expressive activities of a club and does not burden particular forms of speech in a manner that may discriminate among ideas. Third, the law is limited in scope to serve the compelling objective of eradicating invidious discrimination by private associations. The law is directed solely at

discrimination; the law's effect on speech is filtered through its impact on the composition of membership. The Court has pointedly refused to speculate about the effects of such impact. *Roberts*, 104 S.Ct. at 3255.

Finally, Appellant's objections to Local Law 63's alleged overbreadth illuminate the central weakness in this facial challenge to the law. Appellant maintains that the law should include, as elements that the state must show, factors tending to negative the existence of a constitutional defense. Such an approach, however, would not serve to reduce the chilling effect of an overly broad statute by specifying the core conduct that might permissibly be regulated by the state. See *Colten v. Kentucky*, 407 U.S. 104 (1972). To the contrary, the "fluid examination" urged by Appellant would, if embodied in the statute, introduce vagueness and the attendant chilling effect that the overbreadth doctrine was designed to curb.

B. Because Appellant Has Failed To Show Real And Substantial Overbreadth, Its Challenge To Local Law 63 Must Fail

Even if an overbreadth analysis is appropriate, Appellant's challenge must fail because there has been no showing of real and substantial overbreadth. The burden of showing real and substantial overbreadth is especially applicable here because the regulation is directed toward conduct and is tailored to serve a compelling state interest. As the Court noted in *Broadrick*:

But the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so

prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

413 U.S. at 615. In this action, Appellant urges the Court to proceed beyond that point where the impermissible effect of Local Law 63, is at best, a baseless prediction.

The first safeguard against the type of speculation disapproved by the Court in *Broadrick* is a factual record that poses instances of actual protected behavior. Thus, in *Houston v. Hill*, 482 U.S. —, 107 S.Ct. 2502 (1987), the Court could find that the law prohibited a significant amount of protected speech because the appellee had been arrested for such protected speech. Where, as in this case, no factual basis exists for such a determination, the Court has been justifiably reluctant to engage in such uncontrolled speculation. Compare *Lewis v. City of New Orleans*, 415 U.S. 130 (1974) with *Cox v. Louisiana*, 379 U.S. 559 (1965).

Local Law 63 regulates expressive behavior in a manner approved by the Court in *Roberts* and *Rotary Club*. Thus, in the concrete situations presented to the Court, the Court found that no significant range of protected activity was improperly proscribed by anti-discrimination laws. Finally, it is the Appellant who bears the burden of showing substantial overreaching in order to sustain this extraordinary facial attack on a statute that proscribes conduct well within the state's power. The Court insisted on this burden in *Roberts* and *Rotary Club*; nothing in the current case excuses Appellant from this requirement.

II. THE EXEMPTION OF BENEVOLENT AND RELIGIOUS ORGANIZATIONS FROM LOCAL LAW 63 DOES NOT VIOLATE EQUAL PROTECTION

Appellant challenges Local Law 63's exemption for benevolent and religious organizations on the ground that this classification violates the Equal Protection Clause. Appellant maintains that private social clubs on the one hand, and benevolent order and religious corporations on the other, are similarly situated and must be treated the same. Appellant contends that because Local Law 63 burdens certain fundamental rights, any classification system must be narrowly drawn to serve compelling state interests. The current classification under Local Law 63 is not so

narrowly drawn to serve a compelling state interest, Appellant alleges, because business activity and practices may occur at religious and benevolent corporations as well as at social clubs.

Equal protection demands, in the first instance, that the government show "some rationality in the nature of the class singled out." *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966). This requirement is easily satisfied if the challenged classifications are reasonable in light of the law's purpose. *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964).

The exemptions for small clubs and religious and benevolent corporations are supported by the legislative history of Local Law 63. "Because small clubs, benevolent orders and religious corporations have not been identified in testimony before the Council as places where this activity is prevalent, the Council has determined not to apply the requirements of this local law to such organizations." Joint Appendix at 15. The law's exemption also gives a wide berth to those organizations whose religious activities are protected by the First Amendment. As the Court held in a related context, "Where a statute is neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion, we see no justification for strict scrutiny." *Corporation of Presiding Bishop v. Amos*, — U.S. —, 107 S.Ct. 2862, 2870 (1987).

Appellant maintains that the rational relationship test is not applicable in this action because Local Law 63 burdens certain fundamental rights. The importance of a right does not determine whether a challenged statute will be subject to strict scrutiny. Where there is no "constitutional mandate" protecting the right in issue, the statute will not be subject to strict scrutiny. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972). Only established constitutional rights trigger strict scrutiny of a statute. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

As the Court noted in *Roberts*, "acts of invidious discrimination in the distribution of publicly available goods, services and other advantages cause unique evils that government has a compelling interest to prevent." 104 S.Ct. at 3255. Because private associations have no protected constitutional right to discriminate, see

Norwood v. Harrison, 413 U.S. 455 (1973), Appellant's apparent premise is that the law's indirect interference in expressive activities infringes fundamental constitutional rights. The interference, Appellant argues, triggers strict scrutiny under the Equal Protection Clause. This argument is misguided.

As the Court noted in *Roberts and Rotary Club*, the effects of anti-discrimination laws on the exercise of constitutional rights by the clubs in those cases were, at most, speculative and indirect. Appellant provides no basis on which to find that Local Law 63 significantly interferes with protected rights. *Zablocki v. Redhail*, 434 U.S. at 387. Just as the Court should refuse Appellant's invitation to speculate about the possible consequences of enforcement for purposes of the overbreadth challenge, so the Court should decline this request to speculate about the law's impact for purposes of an equal protection challenge.

In *Roberts and Rotary Club*, this Court observed that an anti-discrimination measure could only interfere with expressive activity in an indirect way; namely by changing the composition of a club's membership. Here, this indirect burden on the free speech rights of members is further attenuated. At most, members of clubs that are not distinctly private may avoid the sanctions of Local Law 63 by eliminating the commercial aspects of their clubs. Elimination of these commercial aspects may theoretically curb the effectiveness of certain expressive conduct. Such an indirect effect, however, does not burden a constitutionally protected right in a manner that invokes strict scrutiny. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

CONCLUSION

Local Law 63 is a constitutional exercise of a state's authority to prohibit discrimination by private associations that deprive persons of important opportunities in business and professions. The judgment of the New York Court of Appeals should be affirmed.

DATED: January 11, 1988

Respectfully submitted,

LOUISE H. RENNE

City Attorney

DENNIS AFTERGUT

Chief Assistant City Attorney

GEORGE A. RILEY

Special Assistant to

the City Attorney

Attorneys for Amicus Curiae

APPENDIX

[Discrimination By Clubs or Organizations]

AMENDING PART II, CHAPTER VIII OF THE SAN FRANCISCO MUNICIPAL CODE (POLICE CODE) BY ADDING ARTICLE 33B THERETO, PROHIBITING DISCRIMINATION BY CLUBS OR ORGANIZATIONS WHICH ARE NOT DISTINCTLY PRIVATE AND PROHIBITING EXPENDITURE OF CITY FUNDS ON OR PARTICIPATION BY CITY EMPLOYEES IN ACTIVITIES RELATED TO CITY BUSINESS AT DISCRIMINATORY ESTABLISHMENTS.

Note: This Article is new.

Be it ordained by the People of the City and County of San Francisco:

Section 1. Part II, Chapter VIII, of the San Francisco Municipal Code (Police Code) is hereby amended by adding Article 33B thereto, to read as follows:

ARTICLE 33B

PROHIBITION AGAINST DISCRIMINATION BY CLUBS OR ORGANIZATIONS WHICH ARE NOT DISTINCTLY PRIVATE

Sec. 3300B.1 **FINDINGS AND PURPOSE.** After public hearing and receipt of testimony, the Board of Supervisors finds and declares that:

1. Discriminatory practices of certain clubs or organizations where business is frequently conducted and personal contacts valuable for business purposes, employment and professional advancement are formed are a significant barrier to the advancement of women and minorities in the business and professional life of the City and County of San Francisco.

2. While such clubs or organizations avowedly may have been formed for social or civic purposes, the commercial nature of many of their activities and the extent to which these activities have had a prejudicial impact on the business, professional and

employment opportunities of women and minorities are of significant magnitude.

3. Business activity most frequently occurs in clubs or organizations which have more than four hundred members and which provide regular meal services facilitating the conduct of such business.

4. Employers often pay their employees' membership dues and expenses at such clubs or organizations because the employees' activities at said clubs or organizations serve to develop and enhance the employer's business. Such clubs or organizations also rent their facilities for use as conference rooms for business meetings attended by non-members.

5. Clubs or organizations where the above practices occur provide benefits to business entities and persons other than members and thus are not in fact "distinctly private" in their nature.

6. The City has a compelling interest in eradicating discrimination based on sex, race, creed, color, religion, ancestry, national origin, sexual orientation, or disability in order to assure all of its citizens a fair and equal opportunity to participate in the business and professional life of the City. Conduct and practices which exclude persons from entry to, consideration for membership in, or the full advantages and privileges of such membership on these bases are discriminatory and unacceptable, and are injurious to the body politic, the business community and the City. Accordingly, the City's interest in eliminating such conduct and practices in clubs or organizations covered by this Article outweighs the interest of their members in private association.

7. While the Board of Supervisors recognizes the interest in private association asserted by club members, it finds that this interest does not overcome the public interest in equal opportunity. It is not the Board's purpose to dictate the manner in which certain private clubs conduct their activities or select their members, except insofar as is necessary to ensure that clubs do not automatically exclude persons from consideration for membership or unreasonably prevent enjoyment of club accommodations and facilities on account of invidious discrimination. Furthermore, it is

not the Board's purpose to interfere in club activities or subject club operations to scrutiny beyond what is necessary in good faith to enforce this Article.

Sec. 3300 B.2 DEFINITIONS.

A. For purposes of this Article, a club or organization (hereinafter "club") which is not "distinctly private" is any organization, institution, club or place of accommodation which:

1. Has membership of whatever kind totalling 400 or more; and

2. Provides regular meal service by providing, either directly or indirectly under a contract with another person, any meals on three or more days per week during two or more weeks per month during six or more months per year; and

3. Regularly accepts payments:

(a) from non-members for dues or expenses incurred at the club by members or non-members in the furtherance of trade or business; or

(b) on behalf of non-members for expenses incurred at the club by non-members in the furtherance of trade or business.

B. "Regularly accepts payment" as used in this Article shall mean a club accepting as many payments during the course of a year as the number of weeks any part of which the club is available for use by members or non-members per year; the payments may be for dues, fees, use of space, facilities, services, meals or beverages.

C. "Furtherance of trade or business" as used in this Article shall mean: (1) payment made by or on behalf of a trade or business organization; (2) payment made by an individual from an account which the individual uses primarily for trade or business purposes; (3) payment made by an individual who is reimbursed for the payment by the individual's employer or by a trade or business organization, or other payment made in connection with an individual's trade or business, including entertaining clients or business associates, holding meetings or other business-related events; or (4) payment made by an individual which is

deducted from the individual's federal or state tax returns as a business expense.

Sec. 3300B.3 PROHIBITION AGAINST DISCRIMINATION.

A. It shall be unlawful for a club which is not distinctly private to deny to any person entry to or use of facilities at, membership in, or unreasonably prevent the full enjoyment of said club on the basis of sex, race, creed, color, religion, ancestry, national origin, sexual orientation, or disability.

B. The provisions of this Article shall not apply to an institution organized and operated exclusively for religious purposes as defined 26 U.S.C. Section 501(c)(3).

Sec. 3300B.4 PROHIBITED PRACTICES: CITY MEETINGS

A. No City official or employee shall sponsor, organize, attend or participate in any meeting or other activity, the purpose of which is related to City business, in any establishment or facility which does not afford full membership rights and privileges to any person because of sex, race, creed, color, religion, ancestry, national origin, sexual orientation, or disability, except for City officials or employees acting in the course of ongoing law enforcement, code enforcement or other required investigations and inspections.

B. No City funds shall be expended in connection with any meeting or other activities held at any establishment or facility which does not afford full membership rights and privileges to any person because of sex, race, creed, color, religion, ancestry, national origin, sexual orientation, or disability, except for City funds expended during the course of ongoing law enforcement, code enforcement or other required investigations and inspections.

C. No City official or employee shall be reimbursed for any dues or any other expense incurred at an establishment or facility which does not afford full membership rights and privileges to any person because of sex, race, creed, color, religion, ancestry, national origin, sexual orientation, or disability, except for expenditures incurred by a City official or employee acting in the

course of ongoing law enforcement, code enforcement or other required investigations and inspections. Any request by a City official or employee for payment or reimbursement from City monies shall include a signed statement that the request for payment or reimbursement is not for any expenses incurred at such a private establishment or any other activity, or was incurred in the course of an ongoing law enforcement, code enforcement or other required investigation or inspection.

Sec. 3300B.5 ENFORCEMENT AND PENALTIES.

A. CIVIL ACTION. Any person denied membership in violation of this ordinance may enforce the provisions of this Article by means of a civil action. Any person who violates any of the provisions of this Article shall be liable to the person so denied membership for the actual damages, and such amount as may be determined by a jury, or a court sitting without a jury, but in no case less than two hundred fifty dollars (\$250), and such attorney's fees and court costs as may be determined by the court in addition thereto, suffered by the affected party so denied membership. The City may also enforce the provisions of this Article by means of a civil action.

B. INJUNCTION.

1. Any person who commits an act or engages in any pattern and practice of discrimination in violation of this Article may be enjoined therefrom by any court of competent jurisdiction.

2. Action for injunction under this subsection may be brought by any person so denied membership, by the City Attorney, or by any person or entity which will fairly and adequately represent the interests of the protected class.

C. NON-EXCLUSIVE REMEDIES AND PENALTIES. Nothing in this Article shall preclude any person from seeking any other remedies, penalties or procedures provided by law.

Sec. 3300B.6 NO CRIMINAL PENALTIES. Notwithstanding any provisions of this code to the contrary, no criminal penalties shall attach for any violation of the provisions of this Article.

Sec. 3300B.7 SEVERABILITY. If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of this Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end, provisions of this Article are severable.

APPROVED AS TO FORM:

LOUISE H. RENNE, City Attorney

By:

Deputy City Attorney

AMICUS CURIAE

BRIEF

FOR ARGUMENT

Supreme Court, U.S.
FILED

JAN 13 1988

JOSEPH E. SPANIOLO, JR.
CLERK

No. 86-1836

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JAN 14 1988

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

NEW YORK STATE CLUB ASSOCIATION, INC.,
Appellant,
v.

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF
NEW YORK, THE CITY HUMAN RIGHTS COMMISSION and
THE MEMBERS OF THE CITY HUMAN RIGHTS COMMISSION,
Appellees.

On Appeal from the Court of Appeals
of the State of New York

**BRIEF OF THE LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW
AS AMICUS CURIAE IN SUPPORT OF APPELLEES**

CONRAD K. HARPER
STUART J. LAND
Co-Chairmen
NORMAN REDLICH
Trustee
WILLIAM L. ROBINSON
JUDITH WINSTON
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
Suite 400
1400 Eye Street, N.W.
Washington, D.C. 20005
(202) 371-1212

LLOYD N. CUTLER
Counsel of Record
JAMES ROBERTSON
TERESA D. BAER
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
*Attorneys for Amicus Curiae
Lawyers' Committee for
Civil Rights Under Law*

January 13, 1988

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v.

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF
NEW YORK, THE CITY HUMAN RIGHTS COMMISSION and
THE MEMBERS OF THE CITY HUMAN RIGHTS COMMISSION,
Appellees.

On Appeal from the Court of Appeals
of the State of New York

BRIEF OF THE LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW
AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

INTEREST OF THE *AMICUS CURIAE*

Formed in 1963 at the request of the President of the United States, the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") involves private attorneys in the national effort to ensure the civil rights of all Americans. The Lawyers' Committee has had a broad history of addressing issues of race and sex discrimination in employment, education, and municipal services, among other areas. It believes that discriminatory mem-

bership policies of nominally "private" clubs have a substantial impact on the access of minority groups and women to professional and business opportunities.¹

SUMMARY OF ARGUMENT

The appellant is asking the Court to rule that, because of the way New York City Local Law 63 may apply to speculative and hypothetical situations that are not part of the present record, the law is unconstitutional on its face. No identified club or club member is a party to this case. No facts about any such club or club member are in the record before the Court. The appellant, an association of clubs, may not even have constitutional standing to bring this action. This Court should maintain its long-standing reluctance to strike down laws as facially unconstitutional when applied to hypothetical facts.

On the merits, this case is analogous to *Buckley v. Valeo*.² *Buckley* upheld a federal statutory limitation on contributions to political candidates and committees against the constitutional claim that, on its face, it violated associational freedom. The Court held that the limitation served an important public interest in preventing political corruption and involved only a "marginal restriction" on freedom of association.³ The Court also upheld on its face a statutory requirement for mandatory public disclosure of the names of contributors, leaving open whether this requirement would be unconstitutional for particular candidates and parties who could demonstrate injury of the sort at stake in *NAACP v. Alabama*.⁴

¹ Written consent to the filing of this brief *amicus curiae* in the United States Supreme Court has been obtained from all parties to this case. Copies of the consent letters accompany this brief.

² 424 U.S. 1 (1976) (per curiam).

³ *Id.* at 20-21.

⁴ 357 U.S. 449 (1958).

Here, there is no concrete evidence that Local Law 63 will effect more than a "marginal restriction" on associational rights. At the same time, dealing with discrimination that limits the business opportunities of women and minority groups is plainly an important and compelling state interest.

Moreover, the New York City law's three-pronged test for determining which clubs are "distinctly private" is a rational and permissible legislative classification to which judicial deference is due. Any nominally private club can protect itself against even the minimal state limitations on freedom of association prescribed in Local Law 63 by the simple expedient of forbidding its members to accept reimbursement from their non-member employers for their club expenses incurred to further the trade or business of such members or non-members.

ARGUMENT

The appellant, an association of clubs, is asking the Court to decide that New York City Local Law 63⁵ is unconstitutional on its face. The appellant presents no concrete facts as to the application of that law to any particular club. Instead, it invites a ruling that the law is unconstitutional as to any nominally private club, regardless of the club's activities and practices. We submit that the Court should decline the invitation.

The New York City Human Rights Law⁶ forbids invidious discrimination in "place[s] of public accommodation, resort or amusement."⁷ The law excludes from the definition of "public accommodation" "any institution, club or place of accommodation which . . . is in its nature

⁵ Local Laws, 1984, No. 63 of City of New York, amending Admin. Code § 8-102[9] (J.A. 14).

⁶ Admin. Code of the City of New York, Title 8 § 8-101 *et seq.* (1986).

⁷ *Id.* § 8-107[2].

distinctly private.”⁸ On October 9, 1984, the New York City Council enacted Local Law 63, which defines the term “distinctly private.” Local Law 63 states that a club

shall not be considered in its nature distinctly private if it [1] has more than four hundred members, [2] provides regular meal service and [3] regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of non-members for the furtherance of trade or business (emphasis added).⁹

Immediately after Local Law 63 was enacted, the appellant brought suit alleging that the law is facially unconstitutional because the three-pronged test is overbroad and would force private clubs to admit members and guests they do not want.

I. NO JUSTICIABLE CONTROVERSY IS PRESENTED ON THIS RECORD.

The appellant has not presented the Court with a “case” or “controversy,” and the Court should therefore dismiss the appeal without proceeding to the merits. The trial court (the New York Supreme Court) did find that the appellant had standing to sue and that the case was ripe for review (J.S. 26a).¹⁰ But the appellant has not

⁸ *Id.* § 8-102[9].

⁹ Local Law 63 also provides that benevolent orders and religious corporations are to be considered “distinctly private.” See note 34 *infra*.

¹⁰ Although neither of the state appellate courts addressed these questions, this Court should consider them because they present threshold jurisdictional issues. See *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 490 (1982) (Brennan, J., dissenting); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 260 (1977) (citing *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969)).

demonstrated that it has constitutional standing to bring this case to this Court.

“[T]he gist of the question of standing” is whether the appellant has “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”¹¹ The appellant must therefore show that it—or its member clubs¹²—has suffered actual or threatened injury as a result of the appellees’ actions, and that the injury can be redressed by a favorable judicial decision.¹³

But the appellant has not shown such injury or threat of injury as to transform this case into “a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.”¹⁴ The appellant filed suit immediately after Local Law 63 was enacted, and, so far as the record discloses, before any enforcement effort had begun and before any particular club had made any changes in its admissions policy to comply with the

(plurality opinion)). Furthermore, even assuming that the state court properly followed its own rules regarding justiciability, this Court, because its “jurisdiction is cast in terms of ‘case or controversy,’ . . . cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.” *Doremus v. Board of Educ.*, 342 U.S. 429, 434 (1952).

¹¹ *Baker v. Carr*, 369 U.S. 186, 204 (1962).

¹² See *Warth v. Seldin*, 422 U.S. 490, 515 (1975).

¹³ *Valley Forge Christian College*, 454 U.S. at 472 & n.9 (citing cases).

¹⁴ *Id.* at 472. In *Buckley v. Valeo*, 424 U.S. 1, 11-12 (1976) (per curiam), which we discuss below, the Court interpreted the Federal Election Campaign Act of 1971, as amended in 1974, to confer statutory standing. Because some of the plaintiffs were candidates or political parties supporting named candidates, the Court also ruled that at least those plaintiffs had constitutional standing.

new law.¹⁵ The "proof" of harm or threatened harm amounts to little more than a litany of "beliefs" about speculative future events. For example, the appellant asserts that "women's organizations will be forced to admit men; a gay businessman's association would be forced to admit women; a black businessman's organization would be forced to admit whites; an Italian anti-defamation league would be forced to admit non-Italians; and a politically-defined group would be forced to admit its ideological opposites" (Brief for the Appellant at 38). There is no showing that any such entities exist in New York City or, if they do exist, that they are covered by all three requirements of Local Law 63 and would therefore be deemed not "distinctly private."

Absent record proof of any harm or threat of harm to the appellant, the case has not "matured sufficiently to warrant judicial intervention."¹⁶

II. LOCAL LAW 63 IS NOT VOID ON ITS FACE, AND ANY CONSTITUTIONAL CHALLENGES TO ITS APPLICATION TO PARTICULAR CLUBS OR CLUB MEMBERS SHOULD BE RAISED IN CONCRETE CASES.

The appellant seeks a declaration that, because of the way Local Law 63 may operate in some hypothetical situations, it is unconstitutional on its face. With rare exceptions, this Court has repeatedly rejected claims of facial unconstitutionality, preferring instead to address the constitutionality of laws as they apply to the concrete facts of a specific case.¹⁷ As Justice Stevens has noted:

¹⁵ A few enforcement actions are currently pending. The appellant's arguments, to the extent they are applicable, can be raised in those concrete cases.

¹⁶ *Worth*, 422 U.S. at 499 n.10.

¹⁷ The Court has voided some laws infringing speech on their face, see, e.g., *Schad v. Borough of Mount Ephraim*, 452 U.S. 61

When we follow our traditional practice of adjudicating difficult and novel constitutional questions only in concrete factual situations, the adjudications tend to be crafted with greater wisdom. Hypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors; they are qualitatively less reliable than the products of case-by-case adjudication.¹⁸

*Buckley v. Valeo*¹⁹ illustrates both the rare exception where a finding of facial unconstitutionality is justified and the more typical situation in which the Court rejects such a challenge. *Buckley* involved challenges to the facial constitutionality of several provisions of the newly enacted Federal Election Campaign Act of 1971 (FECA), as amended in 1974, including challenges to dollar limits on the size of individual or group contributions, dollar limits on the size of expenditures by candidates and independent committees supporting such candidates, and mandatory disclosure of the names of contributors. The Court upheld on their face the constitutionality of the limits on contributions and mandatory disclosure of the

(1981) (ban on live entertainment); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) (ban on solicitation of contributions by charities); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (ban on showing nude films in drive-ins), but the Court has not done so where commercial speech or conduct as distinct from speech are at issue, see, e.g., *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (advertising by lawyers); *Arnett v. Kennedy*, 416 U.S. 134 (1974) (discharge of federal civil servants for cause); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (state employees' involvement in politics).

¹⁸ *New York v. Ferber*, 458 U.S. 747, 780-81 (1982) (Stevens, J., concurring); see also *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) ("the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge") (footnote omitted).

¹⁹ 424 U.S. 1 (1976) (per curiam).

names of contributors, but struck down on their face the provisions limiting expenditures by candidates and independent committees supporting such candidates.

The Court acknowledged that contributors had a First Amendment right to association and repeated that "governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.'" ²⁰ However, the Court ruled that "[e]ven a 'significant interference with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." ²¹

Applying that standard, the Court found that the government had an important interest in limiting the size of contributions in order to prevent the corruption that very large contributions had been shown to create. At the same time, the Court found that limiting the amount a person or group could contribute "entails only a marginal restriction upon the contributor's ability to engage in free communication." ²² The Court found no evidence in the record that the Act's limitation on the size of individual contributions "would have any dramatic adverse effect on the [aggregate] funding of campaigns and political associations." ²³ The Court noted that while it is difficult to determine the precise level at which contributions become suspect as tending to induce corruption, Congress did not have to "fine tune" legislation beyond setting a reasonable maximum limit. ²⁴ Accordingly, the

²⁰ *Id.* at 25 (quoting *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958)).

²¹ *Id.* (citations omitted).

²² *Id.* at 20-21.

²³ *Id.* at 21 (footnote omitted).

²⁴ *Id.* at 26-35.

Court declined to invalidate the contributions limitation on its face. ²⁵

The Court also upheld the facial constitutionality of the provision requiring mandatory disclosure of the names of contributors, as had the court of appeals. The Court found *NAACP v. Alabama* ²⁶ "inapposite where, as here, any serious infringement of First Amendment rights brought about by the compelled disclosure of contributors is highly speculative." ²⁷ At the same time, the Court agreed with the decision of the court of appeals to "[leave] open the question of the application of the disclosure requirements to candidates (and parties) who could demonstrate injury of the sort at stake in *NAACP v. Alabama*" since "[n]o record of harassment on a similar scale was found in" the record before it. ²⁸

In contrast, the *Buckley* Court did invalidate on its face the FECA provision banning expenditures in excess of certain limits by a candidate or an independent political committee. But the Court did so for two reasons not present in the Act's limits on the size of contributions.

²⁵ In *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), an earlier case addressing a broad constitutional challenge to the Hatch Act's ban on political activities by federal government employees, the Court had held that the statute served a compelling government interest and posed only a speculative threat to the constitutional rights asserted by the plaintiffs. The Court stated that "[i]t would not accord with judicial responsibility to adjudge [the broader issues until] definite rights appear upon the one side and definite prejudicial interferences upon the other." *Id.* at 90. When a specific case later arose, the Court reviewed the administration of the Hatch Act and upheld the constitutionality of the statute and the regulations "as actually applied in practice." *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 575 (1973).

²⁶ 357 U.S. 449 (1958).

²⁷ *Buckley*, 424 U.S. at 70.

²⁸ *Id.* at 69.

It found an inseparable connection between an expenditure limit and the extent of a candidate's or committee's political speech, which did not exist in the case of a limit on the size of each contribution by a non-speaker unaccompanied by any limit on the aggregate amount a candidate could raise. It also found little if any proven connection between corruption and the size of a candidate's aggregate expenditures, as distinguished from the size of individual contributions to a candidate.

The present case comes much closer to *Buckley*'s reasoning upholding the limit on contributions and the mandatory disclosure of each contributor's identity as facially constitutional than to its reasoning striking down the limit on expenditures as facially unconstitutional. Here, there is no concrete evidence that on its face Local Law 63 will have a significant dampening effect on speech or association, while, as we show in Part III, there is a clear connection between club admission practices and the state's legitimate interest in eliminating discrimination in the conduct of business and commercial affairs.

Moreover, under Local Law 63 any nominally private club can protect itself against the minimal limitations the law imposes on its freedom of association by the simple expedient of forbidding its members to accept reimbursement from their non-member employers for their club expenses for the furtherance of trade or business. Under these circumstances, the hypothetical impairment of any person's freedom of speech and association by Local Law 63 is marginal at best, and is fully justified by the state's interest in assuring that business affairs are conducted free of invidious discrimination. Even if a concrete factual situation may someday arise in which enforcement of Local Law 63 would unreasonably infringe anyone's freedom of association, this hypothetical possibility does not warrant condemning the law as unconstitutional on its face. Any such question should be

left open until a concrete case is presented, just as the *Buckley* court left open that possibility in upholding the facial constitutionality of mandatory disclosure of the names of political contributors.

III. THE CITY HAS AN IMPORTANT PUBLIC INTEREST IN IMPOSING MINIMAL LIMITS ON FREEDOM OF ASSOCIATION WHEN THAT FREEDOM IS EXERCISED IN A BUSINESS CONTEXT.

Buckley and other cases²⁰ show that minimal interference with freedom of association may be sustained if the state demonstrates a sufficiently important interest and employs narrowly drawn means to avoid unnecessary infringement of that freedom.²¹

The City of New York has demonstrated an important and compelling public interest for imposing minimal limits on freedom of association when that freedom is exercised in a trade or business context. The City Council found that club discrimination against women and minority persons hampered their opportunities to achieve business and professional status on equal terms with those accepted as club members and guests, and that the City had a "compelling interest in providing its citizens . . . regardless of race, creed, color, national origin or sex . . . a fair and equal opportunity to participate in the business and professional life of the city."²² It found that some nominally private clubs can have the public consequences of legitimizing separatism and reinforcing

²⁰ See *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 107 S. Ct. 1940, 1945 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); see also *NAACP v. Alabama*, 357 U.S. 449 (1958).

²¹ *Roberts*, 468 U.S. at 623; *Buckley*, 424 U.S. at 25.

²² Local Law 63, Legislative Declaration § 1 (J.A. 14); see also *Club Membership Practices of Financial Institutions: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 96th Cong., 1st Sess. (1979).

discriminatory stereotypes in business and the professions.³² This is because those private clubs, while often characterized as purely social groups without any career significance, are in fact places where business and professional information is regularly exchanged and relationships that generate future career opportunities are regularly cultivated.

While it may be difficult to draw a precise line between those activities at nominally private clubs which are "distinctly private" and those which occur in a trade or business context, the City Council was not required to achieve a perfect separation between "private" and "business" activities, any more than Congress was required to "fine tune" the dollar amount above which a political contribution is deemed conducive to corruption.³³ Based on the circumstances the City Council found to exist in the City's larger private social clubs, it created a three-pronged test—number of members, regular service of meals, and regular receipt of direct or indirect payment of club charges by non-members in furtherance of trade or business. This is a permissible legislative classification to which judicial deference is due under any level of scrutiny.³⁴

³² Legislative Declaration § 1 (J.A. 15); see *Rhode, Association and Assimilation*, 81 Nw. U.L. Rev. 106, 109 (1986).

³³ See *Buckley*, 424 U.S. at 26-35.

³⁴ See, e.g., *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 547-49 (1983); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 40-41 (1973).

As to benevolent orders and religious corporations, the appellant has not made any showing in the record that either class is used to cultivate business relationships or that, but for the express exemption, they would fail all three parts of the three-pronged test of Local Law 63. The Court should therefore decline the invitation to strike down the exemption for benevolent orders and religious organizations as an unconstitutional classification on its face.

The City Council determined that one distinguishing feature of private clubs in New York City that makes them important to the business and professional careers of their members and guests is having 400 or more members.³⁵ While of course "there is no magic to the number 400" (Brief for the Appellant at 24 n.13), neither was there "magic" to the \$1000 limit on individual campaign contributions that was sustained in *Buckley*. Selecting a reasonable numerical cutoff is plainly a proper legislative classification.

Second, the City Council determined that another distinguishing feature important to the business and professional careers of members and guests was regular meal service.³⁶ Colloquial references to "power breakfasts" and tax-deductible "three martini lunches" demonstrate the general belief that dining together offers important opportunities to cultivate business and professional relationships.³⁷

Third, the City Council refrained from regulating the discriminatory practices of nominally private clubs with 400 or more members and regular meal service unless they also satisfied a third litmus test of a business connection: whether such clubs "regularly" accept direct or indirect payments for a member's expenses from "non-members for the furtherance of [the] trade or business" of such members or non-members. The relationship of that test to the business purpose of some activities conducted at a club is too obvious to require elaboration here.

³⁵ Legislative Declaration § 1 (J.A. 15). *Roberts* involved an organization with approximately 400 members. 468 U.S. at 621.

³⁶ Legislative Declaration § 1 (J.A. 15).

³⁷ See also I.R.C. §§ 162, 274 (1986). As the Court noted in *Buckley* with respect to the corrupting tendency of large political contributions, "[a]lthough the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one." 424 U.S. at 27.

No club loses its classification as "distinctly private" unless it fails all three parts of this three-pronged test. Any club that cares enough about its privacy and freedom of association may continue to discriminate as it pleases so long as it abstains from accepting payments directly or indirectly from non-members for the furtherance of trade or business. Regular reimbursement of club members' expenses by employers in furtherance of their trade or business is a reasonable legislative standard for classifying a club as promoting the business relationships of its members and their employers rather than as being "distinctly private." Ruling out such reimbursements is a reasonable legislative requirement to demand of those clubs that may wish to establish a "distinctly private" status.

Finally, the appellant asserts that New York City's three-pronged test creates an irrebuttable presumption and that many clubs which are truly "distinctly private" will now be subject to the public accommodations laws. But that cannot fairly be said of the third prong of the three-prong test. Under the third prong of the test, any club is free to prove that it does not now or will not in the future "regularly" accept payments directly or indirectly from non-members, or that no such payments by non-members are or will be made for the "furtherance of trade or business." Any club that cannot prove at least one of those propositions is hardly in a position to claim that it is so unrelated to the business activities of the City as to deserve being classified as "distinctly private."³⁸

³⁸ The third prong of the test could easily be met by making it a condition of membership in a "private" club that members certify that their dues and other expenses are not being and will not be reimbursed by their employers or other non-members in furtherance of trade or business.

CONCLUSION

For the foregoing reasons, this Court should either dismiss the appeal as non-justiciable or affirm the decision of the Court of Appeals of the State of New York.

Respectfully submitted,

CONRAD K. HARPER
STUART J. LAND
Co-Chairmen
NORMAN REDLICH
Trustee
WILLIAM L. ROBINSON
JUDITH WINSTON
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
Suite 400
1400 Eye Street, N.W.
Washington, D.C. 20005
(202) 371-1212

LLOYD N. CUTLER
Counsel of Record
JAMES ROBERTSON
TERESA D. BAER
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
Attorneys for Amicus Curiae
Lawyers' Committee for
Civil Rights Under Law

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AMICUS CURIAE

BRIEF

No. 86-1836

Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

NEW YORK STATE CLUB ASSOCIATION, INC.,
Appellant,

v.

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF
NEW YORK, THE CITY HUMAN RIGHTS COMMISSION
AND THE MEMBERS OF THE CITY HUMAN RIGHTS COM-
MISSION,

Appellees.

On Appeal from the Court of Appeals
of the State of New York

BRIEF OF THE U.S. CONFERENCE OF MAYORS,
COUNCIL OF STATE GOVERNMENTS,
NATIONAL ASSOCIATION OF COUNTIES,
NATIONAL LEAGUE OF CITIES, AND
INTERNATIONAL CITY MANAGEMENT ASSOCIATION
AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

NANCY J. BREGSTEIN
141 Grays Lane
Haverford, PA 19041
(215) 642-6374
Of Counsel

BENNA RUTH SOLOMON *
Chief Counsel
BEATE BLOCH
STATE AND LOCAL
LEGAL CENTER
444 N. Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for the*
Amici Curiae

QUESTIONS PRESENTED

1. Whether a City may define by specific criteria those organizations that may not restrict membership on the basis of invidious discrimination.
2. Whether the specific criteria set forth in New York City's Local Law 63 are narrowly tailored to further the City's compelling interest in eliminating invidious discrimination by organizations affected with a public interest.

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BRIEF OF THE U.S. CONFERENCE OF MAYORS,
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AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect the powers and responsibilities of state and local governments.

This case presents a challenge, on First Amendment and Equal Protection grounds, to New York City's effort to prohibit invidious discrimination by clubs that play a critical role in the professional and business life of the City. In recent years, there has been increasing recogni-

tion of the importance of exclusive clubs, which function not just as social organizations but as powerful forces in the community. There has been extensive litigation over the status of particular organizations to test whether they partake of a character that permits the government to prohibit invidious discrimination in their membership practices. Indeed, in the last three Terms, two such cases have been resolved only by full opinions of this Court. *Rotary International v. Rotary Club of Duarte*, 107 S.Ct. 1940 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

New York City, in Local Law 63, has identified the clubs subject to its ban on invidious discrimination by the use of specific objective criteria that are consistent with this Court's decisions in *Roberts* and *Rotary*. Numerous other cities, including Buffalo, Chicago, Los Angeles, San Francisco, and the District of Columbia, have enacted similar laws.¹ Other cities have considered such laws,² and a state-wide law is under consideration by the Commonwealth of Kentucky.³

Amici's concern stems from the fact that the law, which plainly falls within the authority of state and local

¹ Buffalo, New York, City Ordinances, Article XXIII of Chapter VII, Discriminatory Practices Concerning Membership or Facilities; Chicago, Illinois, Mun. Code ch. 199A; Los Angeles, California, Mun. Code §§ 44.95.00-44.95.04; San Francisco, California, Police Code, §§ 3300B.1-3300B.7; Washington, D.C., Code § 1-2502.

² Philadelphia, Pennsylvania, Bill No. 835 (introduced Feb. 20, 1986). The City Council of Detroit, Michigan, adopted an anti-discrimination measure ("An Ordinance to amend Chapter 27, Article 1 of the Code of the City of Detroit"), which was vetoed to avoid litigation before the resolution of this case. Letter from Mayor Coleman Young to Detroit City Council (July 24, 1986).

³ Louisville Courier-Journal, Dec. 15, 1987, B-1. The Executive Director of the Kentucky Commission on Human Rights noted that the bill will most likely target clubs with state alcoholic beverage licenses, at which gambling is, and nude dancing can be, prohibited under current law. "All we're trying to do is elevate discrimination to the level of nude dancing and gambling." *Id.*

governments to proscribe discrimination, is challenged primarily because New York City has adopted fixed standards for the law's applicability, rather than to rely on *ad hoc* determinations. This choice, like the choice of specific standards as the basis for any legislation, goes to the heart of the ability of governments to regulate. All governments—federal, state, and local—make such choices countless times daily; and most regulation contains specific criteria describing who is covered and who is not. The need for specific standards may be particularly compelling in an area involving fundamental constitutional rights, where *ad hoc* determinations are themselves vulnerable to attack.

Amici are further concerned with a growing trend toward facial challenges to laws that are undeniably capable of constitutional application (see, e.g., *City of Lakewood v. Plain Dealer Publishing Co.*, No. 86-1042, and *Pennell v. City of San Jose*, No. 86-753). In the present case, the challenge to the law is not raised by any individuals whose constitutional rights are claimed to be violated, nor even by any club to which they belong, but rather by an association of clubs. There has been no attempt to enforce the City's law against any member of the Association; and the Association has provided almost no information about its member clubs. Consequently, there are no facts to support the assertion that the definition will infringe the First Amendment rights of individual club members or of the clubs themselves. The criteria in Local Law 63 have been carefully tailored to implement the City's strong public policy against invidious discrimination; and they further interests that cannot otherwise be served except through laborious case-by-case adjudications, even as to clubs that unquestionably may be brought within the prohibition of discrimination.

Amici submit that the decision below of the New York Court of Appeals is correct. Because this Court's deci-

sion will have a direct effect on matters of utmost importance to amici and their members, amici submit this brief to assist the Court in its resolution of the case.⁴

STATEMENT

Amici adopt appellees' Statement, but wish to emphasize two facts about Local Law 63 and make one observation about appellant's challenge to the law.

1. *The law.* First, Local Law 63 is directed at clubs of substantial size commonly known as "city clubs" or "eating clubs." The law's three criteria focus on the size of the club, whether it regularly provides meal service, and whether it regularly receives income from or on behalf of nonmembers in furtherance of trade or business. This definition exactly describes the clubs that were determined by the City—based on hearings, reports, and studies—to play a significant role in the business and professional life of the City. Local Law 63 reflects a legislative determination that such clubs have become affected with a public interest because they provide their members with opportunities and advantages that should be available to all qualified individuals without invidious discrimination. By its terms, Local Law 63 does not apply to purely social clubs or clubs whose activities involve only their own members.

Second, appellant's complaint that the law will intrude on the clubs' operations by making the "full panoply" of the public accommodations law applicable to covered clubs (*e.g.*, Brief for Appellant 5, 36) is unfounded. The law makes plain that the City's sole concern is to make club membership and its benefits available on a nondiscriminatory basis, not to "interfere in club activities or subject

⁴ Pursuant to Rule 36 of the Rules of the Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

club operations to scrutiny."⁵ Even as to membership, the law does not require clubs to admit all comers. So long as prospective members are considered without regard to race, creed, color, national origin, or sex, clubs remain free to apply all their other membership requirements, no matter how selective.

2. *The challenge.* The nature of appellant's challenge to Local Law 63 is difficult to characterize. It appears that many if not all of the clubs represented by appellant are covered by Local Law 63. Appellant admits that almost all of its New York City members have more than 400 members and provide regular meal service (J.A. 32) and nowhere denies that some or all of its member clubs regularly receive income from or on behalf of nonmembers in furtherance of trade or business. Yet appellant does not provide specific factual information about particular clubs that might show why the law cannot constitutionally be applied to them. Instead, appellant asks this Court to strike down the entire law on the basis of the abstract possibility that it might be unconstitutional because of its theoretical impact on some unidentified club.

SUMMARY OF ARGUMENT

- * In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and again in *Rotary International v. Rotary Club of Duarte*, 107 S.Ct. 1940 (1987), this Court made clear that laws prohibiting invidious discrimination by places of public accommodation may be applied to private

⁵ The Legislative Declaration states (J.A. 16):

It is not the Council's purpose to dictate the manner in which certain private clubs conduct their activities or select their members, except insofar as is necessary to ensure that clubs do not automatically exclude persons from consideration for membership or enjoyment of club accommodations and facilities and the advantages and privileges of membership, on account of invidious discrimination. Nor is the Council's purpose to interfere in club activities or subject club operations to scrutiny beyond what is necessary in good faith to enforce the human rights law.

membership organizations that are affected with a public interest. Local Law 63 represents an attempt by New York City to establish specific criteria defining those clubs that, because of their size, commercial activity, and participation by nonmembers, are prohibited from excluding prospective members on the basis of race, creed, color, national origin, or sex.

Appellant's challenge to Local Law 63 does not take the form of either a traditional facial challenge or a traditional overbreadth challenge. Appellant does not assert that the law can have no constitutional applications. Nor does appellant assert the rights of others not before the Court; it contests the application of the law to some or all of its own member clubs. Yet appellant provides no factual information that might show that the law could not constitutionally be applied to any particular club. The essence of appellant's claim appears to be that the New York City Council has performed the traditional and quintessential legislative task of drawing lines, and that those lines do not meet with appellant's approval.

Local Law 63 does not infringe any recognized constitutional rights of club members. The law's three-pronged definition, which focuses on size, commercial activity, and nonmember participation, describes organizations that bear no resemblance to those intimate relationships protected by the constitutional right of privacy. Appellant places principal reliance on the selectivity of the clubs' membership practices. But selectivity, although essential to a relationship that is accorded constitutional protection, is not alone sufficient to establish privacy rights.

Appellant's assertions concerning the rights of expressive association of its member clubs fare no better. This Court has never held that the right of expressive association encompasses a right to practice invidious discrimination. Moreover, appellant has not shown that any legitimate expressive interests of its clubs or their members will be burdened by the requirement that their mem-

bership decisions not be based on race, creed, color, national origin or sex.

In any event, whatever rights appellant's members or club members may have are not absolute. Even if Local Law 63 works some infringement on First Amendment rights, that infringement is justified by the City's compelling interest in eliminating invidious discrimination in clubs affected with a public interest. The law's specific criteria precisely reflect the City Council's findings concerning the kind of clubs that play a meaningful role in the business, professional, civic, and political life of the community, and the adverse effect of those clubs' discriminatory membership policies on minorities and women.

ARGUMENT

It is no longer open to question that a City may prohibit invidious discrimination in places of public accommodation. See, e.g., *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). Further, this Court has made clear that public accommodations laws may be applied to so-called "private" membership associations that are affected with a public interest. See *Rotary International v. Rotary Club of Duarte*, 107 S.Ct. 1940 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

Roberts and *Rotary* concerned the constitutionality of applying general public accommodations laws to discrimination by membership organizations. The New York City law at issue in this case specifically identifies three characteristics of membership organizations that will bring them within the City's public accommodations law. The definition includes factors found relevant in this Court's decisions: size, commercial activity, and participation of non-members. See *Roberts*, 468 U.S. at 620, 629; see also *Rotary*, 107 S.Ct. at 1946. Thus, Local Law 63 differs

from the Minnesota and California laws whose applications were upheld in *Roberts* and *Rotary* only in that its coverage is a matter of statutory definition rather than judicial case-by-case determination. The use of fixed standards, which characterizes the legislative function, is not an indication of constitutional infirmity. Indeed, specific criteria not only provide an easy measure of constitutional validity, but avoid other constitutional pitfalls in the First Amendment area. The specific criteria adopted by the City in this case, moreover, are clearly constitutional.

I. APPELLANT'S FACIAL CHALLENGE TO LOCAL LAW 63 IS INAPPROPRIATE AND WITHOUT MERIT.

Appellant challenges Local Law 63 on its face, not as applied to any particular club or clubs, and asks that it be invalidated *in toto*. Yet this facial challenge is not like others that the Court has entertained and is not supported by the considerations that have led the Court, in the First Amendment area, to entertain broad challenges to other laws. Moreover, appellant has not shown that Local Law 63 is overbroad. The challenge must therefore be rejected.

A. Appellant's Unorthodox Facial Challenge Should Not Be Entertained.

"There are two quite different ways in which a statute or ordinance may be considered invalid 'on its face'. . . ." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984). The first and more traditional way involves showing that the statute "is unconstitutional in every conceivable application." *Id.* See also *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 965-66 n.13 (1984). Appellant does not make such a claim of facial invalidity in this case; it nowhere argues that the law is not capable of any constitutional applications.

Nor does appellant make the second kind of facial challenge, an "overbreadth" challenge that is allowed because "the very existence of some broadly written statutes might have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected." *Taxpayers for Vincent, supra*, 466 U.S. at 798. "[S]uch a statute may be challenged on its face even though a more narrowly drawn statute would be valid as applied to the party in the case before [the Court]." *Id.* at 799. Overbreadth challenges are an exception to traditional rules of practice (*id.* at 798-99), but they are entertained because of the strong interest in protecting the rights of "others not before the court . . . who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 107 S.Ct. 2568, 2571 (1987) (citation omitted). See also *United States v. Robel*, 389 U.S. 258, 266 (1967)).

Appellant does not invoke this overbreadth doctrine. Appellant does not concede that the conduct of club members is unprotected or that a more narrowly drawn statute would be valid as applied to them. It is not concerned with the rights of strangers to the litigation, but maintains that Local Law 63 may not constitutionally be applied to some or perhaps all of the clubs that it actually represents. Thus, there is no "significant difference" between appellant's claim that Local Law 33 is overbroad and the assertion that it is unconstitutional as applied to appellant's own member clubs. See *Taxpayers for Vincent, supra*, 466 U.S. at 802. As in *Taxpayers*, "[i]t would therefore be inappropriate to entertain an overbreadth challenge" to New York City's law. *Id.*

Appellant's attack on Local Law 63 thus does not conform to any accepted rules of practice. It is not a traditional facial challenge to all applications of the law or a

traditional overbreadth challenge to protect others not before the Court. Rather, it is an "as applied" challenge, albeit without any showing of particular circumstances that would make the law's application to appellant's member clubs unconstitutional. There is no reason why appellant could not have supported its declaratory judgment action with facts about its member clubs and how they would be affected by Local Law 63 that would have "focus[ed] and give[n] meaning to the otherwise abstract and amorphous [constitutional] issues" presented by this case. *J.H. Munson, supra*, 467 U.S. at 977 (Rehnquist, J., dissenting). Appellant's challenge should therefore be rejected.

B. Local Law 63 Is Not Substantially Overbroad.

Appellant's overbreadth arguments would not, in any event, justify invalidating Local Law 63 on its face. Facial overbreadth adjudication is not only an exception to traditional rules of practice, but "[a]pplication of the overbreadth doctrine . . . is, manifestly, strong medicine." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Accordingly, "[i]t has been employed by the Court sparingly and only as a last resort." *Id.* "[P]articularly where conduct and not merely speech is involved," the overbreadth that will invalidate a statute "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615. See also *New York v. Ferber*, 458 U.S. 747, 768-72 (1982) (extending requirement of substantial overbreadth to case involving pure speech). This Court has

repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied. Thus, even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the "remainder of the statute . . . covers a

whole range of easily identifiable and constitutionally proscribable . . . conduct"

Parker v. Levy, 417 U.S. 733, 760 (1974) (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 580-81 (1973)).

The "plainly legitimate sweep" of Local Law 63 is extensive. The law reaches "a whole range of easily identifiable and constitutionally proscribable . . . conduct," namely, invidious discrimination by clubs affected with a public interest because of their role in fostering business and professional opportunities.⁶ Indeed, the law's criteria have been carefully tailored to "extend only as far as the interest that it serves." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 565 (1980). New York City has prohibited invidious discrimination by clubs that have at least 400 members, provide regular meal service, and regularly accept income from or on behalf of nonmembers. These factors characterize the clubs identified at City Council hearings as those that cause significant harm by their discriminatory practices.

Appellant claims, however, that Local Law 63 is not "sufficiently narrowly drawn to pass constitutional muster" because it "does not permit the association to demonstrate that its expressive association may be compromised by the admission of an unwanted member." Brief for Appellant 35. See also *id.* 7, 9-10, 25, 29, 31-32, 33, 34, 35.⁷ This is, to say the least, a novel argument, which

⁶ We discuss the City Council's findings in Part III, *infra*.

⁷ Appellant calls the law's test an "irrebuttable presumption," but does not argue that this aspect of the law violates the Due Process Clause. See *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) (invalidating a conclusive presumption that was neither necessarily nor universally true, embodied in rules relating to maternity leave). In any event, it is well settled that conclusive presumptions are not *per se* unconstitutional. See *Weinberger v. Salfi*, 422 U.S. 749 (1975) (upholding a classification excluding

could be made concerning most, if not all, laws. In effect, appellant faults the law for not inviting and facilitating a showing that it unconstitutionally infringes protected First Amendment rights. But a person whose constitutional rights have been violated by a law's application does not need permission to challenge that application. Indeed, Local Law 63 does not expressly authorize the lawsuit that appellant filed; but the law is not unconstitutional simply because it contains no such authorization. A valid constitutional challenge must include a showing that the law prohibits conduct that the First Amendment protects, and appellant has made no such showing here.

Appellant's real complaint is that Local Law 63 draws lines that appellant does not like. For example, appellant questions the "arbitrary" choice of 400 members as the minimum size of a covered club. Brief for Appellant 24-25. But this kind of line-drawing is characteristic of the legislative function.

"When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must

from Social Security survivor benefits a wife and stepchildren of a wage earner who were related to him for less than nine months prior to his death); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) (upholding irrebuttable presumption of total disability for miners afflicted with pneumoconiosis). See also *Elkins v. Moreno*, 435 U.S. 647, 660-61 (1978) (declining to determine the continued validity of *Vlandis v. Kline*, 412 U.S. 441 (1973), on which *LaFleur* principally relied).

be accepted unless we can say that it is very wide of any reasonable mark."

Village of Belle Terre v. Boraas, 416 U.S. 1, 8 n.5 (1974) (quoting *Louisville Gas Co. v. Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting)). It is up to the legislature to determine, in the context of a particular City's circumstances, what size club plays a sufficiently important role in the life of the community to warrant government regulation. There is nothing unusual, much less unconstitutional, about New York City's choice of a number different from that chosen by other cities. Similarly, it is an appropriate task for the legislature, by itself or through an administrative agency, to determine how regular meal service must be, and how substantial income from or on behalf of nonmembers must be, to warrant the prohibition of invidious discrimination.⁸

In short, there is no basis in the record for a conclusion that Local Law 63 is overbroad at all, let alone substantially overbroad. The constitutional test of a narrowly drawn law is not perfection. "[T]he mere fact that one can conceive of some unconstitutional applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Taxpayers for Vincent*, *supra*, 466 U.S. at 800. Even if there is some way in which the law "may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State

⁸ Appellant also suggests that the law would be more acceptable if it allowed for exemptions based on particularized showings. Brief for Appellant 31 & nn.18-19. But statutes that give government officials discretion to grant exemptions can themselves pose First Amendment problems. See *J.H. Munson*, *supra*, 467 U.S. at 964 n.12; *United States v. Robel*, 389 U.S. at 272-73 (Brennan, J., concurring). Moreover, appellant's suggestion is simply another way of arguing that the law may be unconstitutional as applied to some unspecified club under some undisclosed circumstances.

from enforcing the statute against conduct that is admittedly within its power to proscribe." *Broadrick v. Oklahoma*, 413 U.S. at 615.⁹

II. APPELLANT HAS NOT SHOWN THAT LOCAL LAW 63 INFRINGES ANY RECOGNIZED CONSTITUTIONAL RIGHTS OF CLUB MEMBERS.

Appellant asserts that "freedom of association" comprehends the right of its member clubs to practice invidious discrimination in their membership policies. We show in this section that Local Law 63 does not infringe any legitimate associational interests and that the asserted right of the covered clubs to practice invidious discrimination finds no support in this Court's decisions.

A. The Relationship Among Members Of Clubs Covered By Local Law 63 Is Not Protected By The Freedom Of Intimate Association.

Appellant claims that the clubs covered by Local Law 63 are protected by this Court's decisions recognizing a right of privacy or intimate association. *Amici* submit that this claim is untenable; these clubs can by no stretch of the imagination be considered intimate. Whatever "privacy" may be enjoyed by club members is not the sort of intimate association that is embodied in the constitutional right of privacy.¹⁰

⁹ Such judicial restraint is particularly appropriate here. Appellant has not even attempted to provide examples of clubs to which the law could not constitutionally be applied, even though, as the representative of 125 clubs, it is in an exceptionally good position to make that kind of showing.

¹⁰ Appellant relies on state and federal court decisions interpreting the statutory exclusion of "private" clubs under other public accommodations laws. Brief for Appellant 20-21. But neither these statutory exclusions nor their judicial construction define the scope of the constitutional right of privacy. That is an entirely separate issue, which must be resolved based on this Court's decisions defining that constitutional right.

This Court "has recognized that the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights." *Rotary*, 107 S.Ct. at 1945; see *Roberts*, 468 U.S. at 617-18. But this right of privacy or freedom of intimate association is not implicated every time that individuals associate with one another. To date, the right of intimate association has been recognized only in connection with relationships "that attend the creation and sustenance of a family": marriage; the begetting, bearing, nurturing, and education of children; and cohabitation with relatives. *Roberts*, 468 U.S. at 619; see *Rotary*, 107 S.Ct. at 1945-46. See also *Carey v. Population Services International*, 431 U.S. 678, 685 (1977) (and cases cited therein). The Court "[has] not held that constitutional protection is restricted to relationships among family members" (*Rotary*, 107 S.Ct. at 1946), but it has found that the decisions protecting family privacy "suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection." *Roberts*, 468 U.S. at 619.¹¹ A relationship worthy of constitutional protection must be "highly personal" (*id.* at 618) and must "presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.'" *Rotary*, 107 S.Ct. at 1946 (quoting *Roberts*, 468 U.S. at 619-20).

This Court has denied constitutional protection to relationships that come closer to meeting these criteria than

¹¹ In *Bowers v. Hardwick*, 106 S.Ct. 2841 (1986), the Court held that the constitutional right of privacy did not protect homosexual activity by consenting adults, finding that there had been no showing of any "connection between family, marriage, or procreation on the one hand and homosexual activity on the other." *Id.* at 2844.

the most intimate relationships a club member could possibly share with all the other members of a club large enough to be covered by Local Law 63. In *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), a local zoning ordinance was upheld against the claim that it violated the associational and privacy rights of a group of unrelated student housemates. Although the "right to 'establish a home' is an essential part of the liberty guaranteed by the Fourteenth Amendment" (*id.* at 15 (Marshall, J., dissenting)), the Court held that the ordinance "involve[d] no 'fundamental' right guaranteed by the Constitution, such as . . . the right of association . . . or any rights of privacy." *Id.* at 7-8 (citing, *inter alia*, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *NAACP v. Alabama*, 357 U.S. 449 (1958)).¹² Surely the selection of one's living companions, with whom one shares "distinctively personal aspects of one's life," has a better claim to constitutional protection than the asserted right of a club member to choose or exclude the 401st or 1000th member of his club.

Amici submit that no club that would be covered by Local Law 63 could satisfy the requirements for the constitutional protection afforded intimate relationships. Whatever the other characteristics of particular clubs,¹³

¹² In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Court struck down, on due process grounds, a zoning ordinance that prevented certain family members from living together, but explained that "one overriding factor se[t] [that] case apart from *Belle Terre*. The ordinance [in *Belle Terre*] affected only *unrelated individuals*." 431 U.S. at 498 (emphasis in original).

¹³ The record in this case contains virtually no information about the relationship among members of the clubs that appellant represents. Indeed, appellant has refused to respond to interrogatories requesting information concerning, *inter alia*, "the identity of clubs [appellant] purports to represent in this action and the nature of the effect, if any, of the local law on these clubs," on the ground that the information called for was "irrelevant, confidential and

and whatever the outer limits of the right of intimate association, an organization having 400 or more members must be outside those limits. It flouts common sense to say that one can share "distinctively personal aspects of one's life" on an ongoing basis with 399 other people; that one can have "deep attachments and commitments" of the sort protected by our Constitution to so many people; or that the "necessarily few" other individuals with whom one shares the intimate aspects of one's life number in the hundreds.¹⁴

Even if size were not conclusive, appellant could not show that any club covered by Local Law 63 enjoys the kind of personal intimacy that precludes governmental regulation. By the terms of the law, a covered club must regularly accept payments from or on behalf of nonmembers in furtherance of trade or business. The furthering of trade or business activity and the participation of nonmembers in the activities of the organization are inconsistent with the constitutional concept of intimacy or

improper." Affidavit of Caryn M. Hirshleifer, ¶ 13* (May 24, 1985) (J.A. 47.) Before extending constitutionally protected privacy rights to organizations of hundreds of unrelated individuals, the Court should at least know something about them.

¹⁴ Some of the local chapters of the Jaycees and the Rotary Club considered in this Court's prior decisions were the same size as, or considerably smaller than, the clubs covered by Local Law 63. In *Roberts*, the Minneapolis and St. Paul chapters of the Jaycees had 430 and 400 members, respectively; and some of the local chapters denied protection in *Rotary* had fewer than 20 members. Title VII of the Civil Rights Act of 1964 covers businesses with as few as 15 employees. 42 U.S.C. § 2000e(b). We do not claim that no group of more than 15 or 20 individuals may ever claim a constitutional right of privacy; but in the context of unrelated individuals whose common meeting ground is a club, we cannot imagine—and appellant has not suggested or shown—circumstances that would make a group of 400 or more "intimate."

privacy.¹⁵ Cf. *Marsh v. Alabama*, 326 U.S. 501, 506 (1946) ("The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.").

Appellant's claim that club members share an intimate relationship depends heavily on the alleged highly selective membership policies of its member clubs. Brief for Appellant 22, 23.¹⁶ But selectivity alone cannot entitle these clubs to constitutional protection. To be sure, the unselective membership policies of the organizations in *Roberts* and *Rotary* contributed to this Court's holdings that they could not claim a right of intimate association because exclusivity and selectivity are *necessary* elements of an intimate relationship. As *Belle Terre* makes clear, however, they are not in themselves *sufficient* to establish such a relationship; that case involved highly selective and exclusive relationships.¹⁷ So did *Hishon v. King & Spalding*, 467 U.S. 69 (1984), where the Court held that Title VII of the Civil Rights Act of 1964 applies to the partnership decisions of a law firm. Few associations are as selective or exclusive as private law partnerships.¹⁸ If they cannot claim a right of intimate associa-

¹⁵ Appellant errs in claiming that this Court has required "substantial" participation by nonmembers to defeat a claim of intimacy. See Brief for Appellant 27. The Court found substantial participation by nonmembers in *Roberts* but did not suggest that other organizations with a lesser extent of nonmember participation would necessarily be entitled to claim a right of intimate association.

¹⁶ The only record support for the assertion is a conclusory statement in the affidavit of Walter S. de la Plante, appellant's president, which states: "The hallmark of [appellant's] City club members is that they steadfastly adhere to exacting standards in their admissions policies, governance and administration of their facilities. Selectivity is of critical importance" (J.A. 32.)

¹⁷ See also *Bowers v. Hardwick*, 106 S.Ct. 2841 (1986).

¹⁸ "The essence of the law partnership is the common conduct of a shared enterprise. The relationship among law partners con-

tion for their partnership decisions, then a large club can hardly claim that right for its membership decisions, even if its membership policies are highly selective.

This Court has said that the absence of selectivity is inconsistent with a right of privacy; it has never held that selectivity alone confers a right to constitutional protection. In this case, the alleged selectivity of the clubs covered by Local Law 63 cannot insulate them from the prohibition of discriminatory membership policies, when their size, character, and activities belie any resemblance to the intimate relationships that have been accorded a constitutional right of privacy.

B. Local Law 63 Does Not Infringe Any Rights Of Expressive Association.

Appellant claims that "[t]he forced admission of persons who either espouse contrary views or those whose presence is inimical to the views of the club, plainly interferes with the right of expressive association." Brief for Appellant 34. Most of appellant's argument on this point is that Local Law 63 is not justified by a compelling governmental interest, a point that we address in Part III, below. A more fundamental flaw in appellant's case is the absence of any showing that Local Law 63 infringes legitimate rights of expressive association. In fact, the law does not. Appellant has glossed over two critical points: first, the Constitution does not, in the name of freedom of association, confer an affirmative right to discriminate; and second, even if the associational interests asserted are entitled to some constitutional protection, appellant has not shown that Local Law 63 burdens those interests.

templates that decisions important to the partnership normally will be made by common agreement . . . or consent among the partners." *Hishon v. King & Spalding*, 467 U.S. at 79-80 (Powell, J., concurring).

1. *No constitutional right to discriminate.* Appellant asserts that Local Law 63 violates club members' rights by requiring "private associations to accept members whom they do not want." Brief for Appellant 35. Appellant does not, however, address the underlying prerequisite to its claim: whether a club's protected associational rights encompass a right to exclude individuals on grounds of race, creed, color, national origin, sex, or other invidious criteria. It is far from clear that the right of expressive association *ever* protects invidious discrimination. On the contrary, this Court has consistently refused to endorse a constitutional right to *practice* discrimination, as opposed to the right to believe in or advocate it. In *Norwood v. Harrison*, 413 U.S. 455 (1973), the Court held that a State could not lend financial assistance in the form of free textbooks to racially discriminatory private schools. As the Court explained,

although the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has *never* been accorded affirmative constitutional protections.

Id. at 469-70 (emphasis added).¹⁹

¹⁹ The principle expressed in *Norwood* found earlier articulation in *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1945). There, the Court upheld the application of the New York Civil Rights Law to a union, which the Court characterized as a "purely private organization." *Id.* at 96. The Court found "no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed." *Id.* at 94. Justice Frankfurter called the contrary claim by the union "devoid of constitutional substance." *Id.* at 98 (Frankfurter, J., concurring). He added (*id.*):

Of course a State may leave abstention from [racial and religious] discriminations to the conscience of individuals. On the other hand, a State may choose to put its authority behind

This Court has consistently adhered to the principle stated in *Norwood*. In *Runyon v. McCrary*, 427 U.S. 160 (1976), the Court held that there is no constitutional right to discriminate in the selection of who may attend a private school. Although willing to "assum[e] that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions" (*id.* at 176), the Court concluded that "it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle." *Id.* (emphasis in original). In *Hishon v. King & Spalding*, *supra*, the Court relied on *Norwood*, *Runyon*, and *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945) (see n.19, *supra*), in rejecting an argument that the application of Title VII to a law firm's partnership decisions "would infringe constitutional rights of expression or association." 467 U.S. at 78.²⁰

one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment. Certainly the insistence by individuals on their private prejudices . . . ought not to have a higher constitutional sanction than the determination of a State to extend the area of non-discrimination beyond that which the Constitution itself exacts.

²⁰ In *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), which upheld the constitutionality of the Civil Rights Act of 1964 as applied to a 216-room motel, the Court explained that the motel owner "ha[d] no 'right' to select its guests as it sees fit, free from governmental regulation." *Id.* at 258-59. See also *Palmore v. Sidoti*, 466 U.S. 429 (1984), where the Court reversed a Florida court's ruling that the existence of racial bias and the possibility of resulting injury to a child in an interracial household were permissible reasons for the removal of the child from the custody of its natural mother. The Court explained: "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.* at 433.

In short, this Court has never endorsed the notion that invidious private discrimination is an exercise of the freedom of association that is protected by the First Amendment; and it should not do so now. According to "affirmative constitutional protection" to invidious private discrimination by organizations affected with a public interest would stifle the efforts of state and local governments to ensure equality of opportunity to minorities and women.

2. *No infringement of legitimate associational interests.* The clubs covered by Local Law 63 do not seem to be organizations that exist for "the advancement of beliefs and ideas" (*NAACP v. Alabama*, 357 U.S. 449, 460 (1958)), which normally is the type of activity protected by freedom of expressive association.²¹ It therefore is far from clear that such clubs possess a protected First Amendment right at all.²² But even assuming that the

²¹ Appellant seeks to bring its member clubs within the traditional framework of expressive association by arguing that some clubs may want to advance ideas. But rather than providing any specific examples of such clubs, appellant merely speculates that "certain clubs covered by Local Law 63 may well exist primarily for purposes of espousing unpopular ethnic, race or gender related positions." Brief for Appellant 34 (emphasis added).

²² It has been suggested that this Court has not protected freedom of association independent of the explicit guarantees of the First Amendment. See Raggi, *An Independent Right to Freedom of Association*, 12 Harv. C.R.-C.L. L. Rev. 1 (1977). In *Garcia v. Texas State Bd. of Medical Examiners*, 384 F. Supp. 434 (W.D. Tex. 1974), *aff'd mem.*, 421 U.S. 995 (1975), it was held that no right protected by the First Amendment was infringed when the State prohibited incorporation of a group of individuals for the purpose of providing medical care to low-income patients through the services of salaried physicians. The only difference between *Garcia* and cases recognizing a right of expressive association in connection with group legal practice (e.g., *NAACP v. Button*, 371 U.S. 415 (1963)), is that health maintenance "seemed to enjoy no special link to speech or petition, while litigation and lawyering were obvious species of both." L. Tribe, *American Constitutional Law* 702 (1978).

functions performed by city clubs, as described by appellant (at 13-15), may be treated as expressive interests protected by the First Amendment, appellant has made no showing that admitting minorities or women to those clubs "will affect in any significant way the existing members' ability" to further those interests or fulfill those functions. *Rotary*, 107 S.Ct. at 1947.²³

The reasons given by members of city clubs for maintaining their discriminatory membership policies not only fail to rise to the level of associational interests worthy of constitutional protection, but would be quite comical if they were not so pernicious. Those reasons generally include the lack of adequate physical facilities or stereotypical and "archaic"²⁴ assumptions about what the admission of minorities or women would do to the atmosphere of the club.²⁵ The reasons given are not the kind that are recognized by the Constitution, and they should not be credited by this Court.

²³ See also *Roberts*, 468 U.S. at 627 ("no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in . . . protected activities or to disseminate its preferred views"); *Hishon v. King & Spalding*, 467 U.S. at 78 (no showing by law firm "how its ability to fulfill . . . function [of contributing to society] would be inhibited by a requirement that it consider [woman associate] for partnership on her merits"); *Runyon v. McCrary*, 427 U.S. at 176 ("no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in [private] schools of any ideas"). This Court has repeatedly refused to accept showings based on unsupported generalizations about race-based or gender-based attitudes. See, e.g., *Watson v. City of Memphis*, 373 U.S. 526 (1963); *Reed v. Reed*, 404 U.S. 71 (1971).

²⁴ *Roberts*, 468 U.S. at 625.

²⁵ Members of exclusive clubs often are less guarded in stating their reasons for excluding women than they are in explaining their exclusion of minorities. Some of the stated reasons for excluding women are collected in Burns, *The Exclusion of Women From Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 Harv. C.R.-C.L. L. Rev. 321, 344-45 (1983). For example, counsel for the highly influential and exclusive

III. LOCAL LAW 63 SERVES THE CITY'S COMPELLING INTEREST IN ELIMINATING INVIDIOUS DISCRIMINATION IN CLUBS AFFECTED WITH A PUBLIC INTEREST.

Local Law 63 would not be invalid even if it burdened constitutionally protected associational interests of private clubs and their members. "The right to associate for expressive purposes is not . . . absolute." *Roberts*, 468

Bohemian Club in San Francisco defended the club's male-only hiring policy on the ground that women at the club's country retreat would "'inhibi[t]'" members "'from wearing women's clothes during theatrical productions and from freely urinating on trees.'" *Id.* at 344 n.76. A former vice-president of New York's prestigious University Club objected to the admission of women on the ground that the "'chatter and noise will be like Macy's basement at a post-Christmas sale.'" *Id.* at 345. A member of Philadelphia's Union League feared the admission of women would turn the club into a "'henhouse,'" with "'cackling'" and all; and at Washington's Metropolitan Club, an official defended the club's exclusion of women by saying: "'As much as we love the girls, we just don't have the lavatory facilities to take care of them and all the men who come in for lunch.'" *Id.* At New York's Century Association, members predicted that admitting women as members would lead to "'less peace at home once male Centurions began disporting with successful young women members at the club.'" *Id.*

Similar reasons were presented to the New York City Commission on Human Rights in hearings held in 1974. The reasons ranged from the

trivial and practical, expressed as "we haven't enough wash-rooms," to an inability to distinguish sexuality from professionalism or, "I wouldn't want to meet last night's date at lunch," or "wives of married men would not want their husbands attending club meetings if other women were members." Additional arguments are that men will have to modify their language, change their dress style, clubs may devote less of the facilities to sports, or that women would destroy the casual atmosphere and begin to "pretty up the place" . . .

E. Lynton, *Behind Closed Doors: Discrimination by Private Clubs* (A Report Based on City Commission on Human Rights Hearings) 25 (1975).

U.S. at 623. In this case, as in *Rotary*, any possible infringement "is justified because it serves the State's compelling interest in eliminating discrimination" *Rotary*, 107 S.Ct. at 1947.

The Court noted in *Roberts* that ensuring equal access to leadership skills and business contacts and promotions, such as those offered by the Jaycees, "clearly furthers compelling state interests." 468 U.S. at 626. *See also Rotary*, 107 S.Ct. at 1948. The Court also noted that discriminatory membership policies deprive those excluded "of their individual dignity and deny society the benefits of wide participation in political, economic, and cultural life." *Roberts*, 468 U.S. at 625. These considerations are sufficient to sustain the constitutionality of Local Law 63, just as they sustained the constitutionality of applying public accommodations laws to the organizations involved in *Roberts* and *Rotary*.

Appellant and its amici attempt to distinguish *Roberts* and *Rotary* by minimizing the public role of the clubs covered by Local Law 63, which they characterize as "merely" social clubs where men of like ilk may relax, "break bread," and get away from it all.²⁶ Indeed, appellant claims that the clubs operate in a "totally private sphere." Brief for Appellant 35. But appellant's own reliance on the importance of city clubs in the fabric of American society (see Brief for Appellant 8, 13) undermines its claim that the clubs are merely social. There is overwhelming evidence that clubs like those described in the law play a central role in the business, professional, civic, and political life of New York City, as well as other communities, large and small, throughout the country. Thus, the compelling state interests found in *Roberts*

²⁶ See, e.g., Brief for Appellant 14; Brief of Francisca Club, Town and Country Club, and the Family 14 (filed Nov. 19, 1987); Brief of Conference of Private Organizations 5-11 (filed Nov. 19, 1987).

and *Rotary*—to ensure equal access and protect personal dignity—extend to city clubs as well.²⁷

First, the automatic exclusion of minorities and women from membership privileges in city clubs deprives them of business and professional advantages and opportunities as significant as those found in *Roberts* and *Rotary*.²⁸ Testimony before the New York City Commission on Human Rights showed “that private exclusionary policies in too many instances threaten public policy barring job discrimination today.” *Behind Closed Doors*, *supra* n.25, at 7. The report on those hearings emphasized that “the integral relationship” between “club membership and achievement in business and in the professions has been well documented by solid research.” *Id.* at 13 (and authorities cited).²⁹ Such clubs provide opportuni-

²⁷ The City’s compelling interest in eliminating invidious discrimination in membership practices is buttressed by other constitutionally protected associational values. “[T]he right of one person or group to exclude others is inevitably a limitation upon the freedom—including the associational freedom—of those others.” L. Tribe, *American Constitutional Law* 974 (1978). In this respect, membership in private clubs may be compared to the right of access to broadcast facilities. See *CBS, Inc. v. FCC*, 453 U.S. 367 (1981); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding FCC rules and regulations mandating access to the airwaves, notwithstanding the resulting limitation on broadcaster freedom). Like broadcast facilities, the benefits of membership in prestigious city clubs constitute a scarce resource. The prohibition of invidious discrimination represents a proper balance among the associational interests of club members, individuals who would be excluded on invidious grounds, and members who support the admission of minorities or women. See *CBS, Inc. v. FCC*, 453 U.S. at 397.

²⁸ See, e.g., Lynton, *supra* n.25, at 3, 7, 13; Burns, *supra* n.25, at 321-34; Marshall, *Discrimination and the Right of Association*, 81 Nw. U. L. Rev. 68, 92-94 (1986); Rhode, *Association and Assimilation*, 81 Nw. U. L. Rev. 106, 120-23 (1986).

²⁹ See also Burns, *supra* n.25, at 324 (“prestigious clubs exert an enormous influence on our country’s commercial and political life”). Surveys of male executives have confirmed reports from business and professional women attesting to the critical importance of club mem-

ties for “social status, informal exchanges, and personal contacts” and serve as “forums for exchanging information and developing relationships that generate business or career opportunities.”³⁰ In addition to the loss of such contacts, exclusion from membership results in exclusion from business meetings held at the clubs, from the use of club facilities to hold meetings or entertain clients in a suitable setting, and from consideration for promotion or executive responsibilities because of the lack of suitable club membership.³¹

Second, the prestigious private club “may represent the culmination of professional advancement; thus, a categorical exclusion of minorities from its membership may prevent them from ever achieving complete professional

bership to career advancement. See Rhode, *supra* n.28, at 121 & n.74 (and cited authorities); Burns, *supra* n.25, at 328 n.19. Indeed, “[b]ecause of the magnitude of the impact of the private social club in American life, it is doubtful that either political or economic equality can be achieved without some measure of equal access to club benefits.” Note, *Discrimination in Private Social Clubs: Freedom of Association and Right to Privacy*, 1970 Duke L.J. 1181, 1221; see also *id.* at 1222.

³⁰ Rhode, *supra* n.28, at 121. These aspects of club membership are tremendously important in a society in which “men obtain almost one-third of their jobs through personal contacts, and probably a higher percentage of prestigious positions.” *Id.*

³¹ See Note, *Discrimination in Private Social Clubs*, *supra* n.29, at 1189; Lynton, *supra* n.25, at 14-15, 18. The widespread subsidization of club membership by employers, as well as the availability and extensive use of business expense tax deductions for memberships and expenses at the clubs, “is tacit recognition of the business function performed by most private clubs.” Note, *supra*, at 1216-17. Indeed, the documentation and recordkeeping undertaken by club members and their employers to substantiate their tax deductions provide a ready means of determining whether income to the club is in furtherance of trade or business. Appellant’s stated concern that club members’ conversations need be monitored (Brief at 26 n.15, 37, 40) is therefore unwarranted.

acceptance.”³² Moreover, the discriminatory policies of highly selective clubs may have a particularly insidious and damaging impact on societal prejudice and discrimination. “When doctors, lawyers, judges, politicians, and corporate executives unabashedly practice discrimination as members of discriminatory clubs, there exists an implied sanction of discrimination in society generally.”³³ Finally, “[t]he exclusion of women [and minorities] from spheres conventionally classified as private contributes to [their] exclusion from spheres unquestionably understood as public.”³⁴

In short, overwhelming evidence supports the conclusion that the City’s interest in eliminating invidious discrimination in city clubs is as compelling as the interests relied upon in *Roberts* and *Rotary*. Yet appellant persists in claiming that the City lacks sufficient interest in “private” clubs to require them to afford the equal access that it has mandated for “publicly available opportunities.” Brief for Appellant 13, 15 (emphasis in original). But those so-called “publicly available opportunities” involved *private* housing,³⁵ *private* education,³⁶ *private* employment,³⁷ and *private* lodging.³⁸ In each of these areas, privately owned facilities that had become affected with a public interest were brought within the coverage of the civil rights laws.³⁹ The same is true of

³² Marshall, *supra* n.28, at 93.

³³ Burns, *supra* n.25, at 333.

³⁴ Rhode, *supra* n.28, at 120.

³⁵ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

³⁶ *Runyon v. McCrary*, 427 U.S. 160 (1976).

³⁷ *Hishon v. King & Spalding*, 467 U.S. 69 (1984).

³⁸ *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

³⁹ *Cf. Munn v. Illinois*, 94 U.S. 113, 126 (1877): “Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.”

the clubs covered by Local Law 63.⁴⁰ The advantages and benefits provided by city clubs, and the role they play in the business, professional, civic, and political life of the community, foreclose any claim that they, any more than the institutions previously brought within the coverage of the civil rights laws, operate in a private sphere immune from the prohibition of invidious discrimination.

IV. LOCAL LAW 63 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

Amici will not address the equal protection issue except to note that it cannot succeed if appellant’s First Amendment challenge fails. If appellant’s First Amendment arguments are rejected, either because Local Law 63 does not infringe valid First Amendment interests or because of the strength of the City’s interest in eradicating discrimination, then Local Law 63 cannot possibly violate the Equal Protection Clause. The considerations that would support the law against a First Amendment challenge would be sufficient to satisfy the applicable standard of review under the Equal Protection Clause. See *Posadas de Puerto Rico Associates v. Tourism Co.*, 106 S.Ct. 2968, 2979 n.9 (1986) (citation omitted).

⁴⁰ Indeed, Local Law 63 reinforces the ban on discrimination by places of accommodation that are indisputably public. “Many [private clubs] serve the same function as restaurants. Business is discussed and consummated.” Lynton, *supra* n.25, at 7.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of New York should be affirmed.

Respectfully submitted,

NANCY J. BREGSTEIN
141 Grays Lane
Haverford, PA 19041
(215) 642-6374
Of Counsel

BENNA KUTH SOLOMON *
Chief Counsel
BEATE BLOCH
STATE AND LOCAL
LEGAL CENTER
444 N. Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
* *Counsel of Record for the*
Amici Curiae

January 13, 1988

AMICUS CURIAE

BRIEF

JAN 13 1988

JOSEPH F. SPANIOLO, JR.
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1987

NEW YORK STATE CLUB ASSOCIATION, INC.,
Appellant,

vs.

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF NEW
YORK, THE CITY HUMAN RIGHTS COMMISSION AND THE
MEMBERS OF THE CITY HUMAN RIGHTS COMMISSION,
Appellees.

**ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK**

BRIEF OF AMICI CURIAE

**THE CITY OF LOS ANGELES, THE CITY OF
WILMINGTON AND WOMEN LAWYERS'
ASSOCIATION OF LOS ANGELES**

PAMELA A. ALBERS,
Deputy City Attorney
Counsel of Record
Los Angeles City Attorneys' Office
(James K. Hahn, City Attorney)
VANESSA PLACE, Deputy City Attorney
200 North Main Street — 1600 CHE
Los Angeles, California 90012
(213) 485-5030
for the City of Los Angeles
KIM MCCLANE WARDLAW
for Women Lawyers' Assoc. of L.A.
MICHAEL P. REYNOLD, City Solicitor
JOHN R. SHERIDAN, Asst. City Solicitor
for the City of Wilmington, Delaware
*Attorneys for Amici in Support of
Appellees*

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No. 86-1836

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THE CITY OF LOS ANGELES, THE CITY OF
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STATEMENT OF INTEREST OF AMICI

On May 29, 1987, The City Council of Los Angeles enacted Ordinance No. 162,426 entitled "Prohibition Against Discrimination by Clubs or Organizations Which are Not Distinctly Private." The ordinance as codified* was based upon the City Council of Los Angeles' findings "that a significant barrier to the advancement of women and minorities in the business and

*Ordinance No. 162426 is codified as Los Angeles Municipal Code Section 45.95.00 *et seq.* All references here use the codified citation. The entire text is set forth at pages 1a-6a in the Appendix to this Brief.

professional life of the City exists by virtue of the discriminatory practices of certain clubs or organizations which are not distinctly private and where business is frequently conducted." (Los Angeles Municipal Code, Section 45.95.00). The Council further found that "the extent to which many of the activities [in such clubs and organizations] have had a prejudicial impact on the business, professional and employment opportunities of women and minorities [they] cannot be ignored or minimized." (Section 45.95.00).

The ordinance as enacted provides that it is unlawful for organizations which have 400 or more members, and provide regular meal service, and regularly accept payment from or on behalf of nonmembers for expenses incurred at the club in the furtherance of business or trade to invidiously discriminate. (Section 45.95.01 *et seq.*) The Los Angeles ordinance is based upon the findings of the City Council of Los Angeles after three days of public hearings, both before the Personnel and Labor Relations Committee and on the Council floor. During the course of these public hearings, extensive written and oral testimony was taken to the effect that a significant barrier to the advancement of women and minorities in the business and professional life of the City of Los Angeles is created by discriminatory membership practices of certain clubs and organizations which are not distinctly private in nature. The Personnel and Labor Relations Committee concluded from the testimony taken that business deals are often made and personal contacts invaluable to business, employment and professional advancement are formed at large business clubs. The Committee further found that business meetings and related activities often occur at these clubs. It determined that dues and expenses of members are generally paid by their employers because the employee's activities, including hosting and entertaining current or prospective clients at the club, unquestionably further the employer's business interests. The Committee reported to the Council that large business organizations rent facilities to members and nonmembers for business meetings. The Committee concluded that rental of club

facilities clearly provides benefits to the businesses involved and to nonmembers.**

During the three extensive public hearings, representatives of several elected officials, business professionals, representatives from civic and community associations and public advocacy groups testified as to the need for an ordinance prohibiting discrimination by large commercially oriented clubs. These wide ranging groups universally urged adoption of the proposed ordinance because of the uniform recognition that such clubs are significant professional and commercial centers in Los Angeles.

For example, United States Congressman Howard Berman commented that "these clubs clearly provide professional opportunities to their members."*** The State Bar of California, Committee on Women in the Law stated that clubs "generally serve as meeting, luncheon, or dinner places and are convenient for entertaining clients and meeting with other counsel in ongoing litigation or business dealings."

The Center for Public Interest in the Law provided information that "[d]espite the gains that have been made . . . it is apparent that women and minorities are still not fully integrated into the business world in this community. While these groups have achieved success at the entry levels, they are still woefully underrepresented in the upper echelons and the 'executive suites.' Studies confirm this regrettable fact . . ."

The Center further noted one reason for the inability of women and minorities to compete effectively in the business world is their "exclusion from discriminatory [clubs] that foster the business goals of . . . their memberships." Large business clubs are often "informal centers of power in the business world, affording their members unique opportunities

**The report of the Personnel and Labor Relations committee is set forth in the Appendix, 7a-12a.

***The full text of all testimony cited appears in the Appendix, 13a-22a.

for forging personal contacts and arranging business deals," and studies cited "confirm the critical role that memberships in such clubs play in advancing within the business community."

The Los Angeles chapter of the National Organization for Women stated the "exclusion [from clubs] deprives women and minorities of equal economic opportunity, subjects them to personal humiliation and confirms a belief that women and minorities are inappropriate participants in the exercise of power by barring them from informal centers of power."

Los Angeles City Controller Rick Tuttle testified, "[t]hese clubs are large powerful institutional centers where members negotiate business deals and advance their professional goals."

In addition to the commentators quoted above, representatives of the Civil Rights Enforcement Unit of the Attorney General's Office, the Los Angeles chapter of the NAACP, the Los Angeles Advisory Council on Disability, the American Civil Liberties Union and the Anti-Defamation League of B'nai B'rith emphasized that discriminatory practices by large clubs oriented to business deny women and minorities professional opportunities and attested to the important effect which anti-discrimination legislation would have in eradicating these barriers.

The Los Angeles City Council debated the constitutional concerns raised by representatives of various groups which might be subject to an anti-discrimination ordinance and sought the legal expertise of the Office of the City Attorney.

The City concluded that the professional barriers raised by the exclusion of women and minorities from important commercial and business centers create a glass ceiling. This glass ceiling keeps women and minorities from realizing their full potential in the professional world by denying them equal access to the commercial contacts, professional prestige and leadership development opportunities found at clubs which

have over 400 members, regularly serve meals, and accept payments from nonmembers for commercial use of club facilities. The City Council further recognized that the harmful effects of this discrimination affect the City of Los Angeles as a whole, and cast a dark shadow on the important advances the City has made toward eradicating invidious discrimination by and against the citizens of Los Angeles.

The City of Los Angeles' continuing commitment to assuring equal professional and economic opportunities for all of its citizens is expressed in its passage of legislation similar to the law challenged here. The Mayor and the City Council directed the City Attorney to file an *amicus* brief**** to demonstrate the importance of this issue and to respectfully urge that Los Angeles be permitted to legislate in this area.

The City of Los Angeles is joined in this brief by:

Women Lawyers' Association of Los Angeles

The Women Lawyers' Association of Los Angeles ("WLALA") is a county-wide bar association affiliated with the Los Angeles County Bar Association and California Women Lawyers. WLALA currently has over 1300 members, including male and female lawyers, judges and law students, all of whom are concerned with the legal rights of and equal treatment for women. As a professional organization whose members live and work predominantly in the Greater Los Angeles area, WLALA is deeply concerned about and directly affected by the presence of the discriminatory business clubs that deprive women and minorities of equal opportunities, which the Los Angeles ordinance seeks to regulate. WLALA

****The City of Los Angeles has filed its own brief in this case because of the importance of the issues presented and the profound effect this Court's decision could have upon the City's ability to address invidious discrimination. The City of Los Angeles wishes to express its concurrence in and support of the arguments presented by the American Civil Liberties Union.

files this brief in conjunction with the City of Los Angeles in support of New York Local Law 63, which, like the Los Angeles ordinance, proscribes invidious discrimination.

The City of Wilmington, Delaware

On October 1, 1987, the City of Wilmington, Delaware adopted an ordinance similar in scope and effect to New York's Local Law 63. After two full public hearings, the Wilmington City Council and the Mayor of Wilmington determined that discrimination by large business clubs which are not distinctly private denies women and minorities equal professional and leadership opportunities.

The City of Wilmington joins the City of Los Angeles in urging this Court to permit municipalities to address the social harms caused by invidious discrimination in significant commercial and professional centers.

SUMMARY OF ARGUMENT

In the context of associative rights, the Court has recognized two distinct freedoms. One is the right to intimate association. In *Roberts and Rotary*, this Court, without dissent, held that anti-discrimination legislation may be constitutionally applied to associations which fall outside those protected by the right of intimate association. Local Law 63 does not violate the freedom of intimate association.

Appellant argues that Local Law 63 will unconstitutionally interfere with its member clubs right of intimate association, but does not provide the Court with foundational facts from which to determine such alleged right. The provisions of Local Law 63, which are applied conjunctively, limit the scope of the regulation to associations which have more than four hundred members, regularly serve meals and regularly include non-members in club activities which have commercial and professional ramifications for participants. These characteristics

differ markedly from those found in the associations identified by the Court as giving rise to intimate associative rights.

Expressive association is the second right claimed here. Appellant's claim of infringement of expressive rights founders because of the clubs' failure to provide this Court with the type of extensive information available in *Roberts* and *Rotary*. Moreover, expressive association claims must be supported by some showing that the admission of the excluded class will have a harmful effect upon the message expressed associatively. No such showing is offered or made here. If any harm is shown, there again is insufficient information available to balance such harm against the City's compelling interest in eliminating invidious discrimination.

Overbreadth claims, raised under the guise of irrebutable presumption, are unsupported by any demonstration that Local Law 63 infringes upon any constitutionally protected right of association, speech or privacy. Appellant fails to proffer even one example of an association which has over 400 members, regularly serves meal, allows nonmembers to pay to participate in club activities related to professional and business advancement, and also engages in invidious discrimination which could validly claim associative protections.

Appellant claims that Local Law 63 violates the Equal Protection Clause because it exempts religious organizations and benevolent orders. This argument must fail as the Council of the City of New York made a legislative determination based upon facts presented to it that the exempted classes are not similarly-situated to those subject to the ordinance. Even if there exist some minor similarities between the exempted associations and those covered by the ordinance, these classifications should be examined on the basis of whether they are related to a legitimate public purpose. The record before the Council makes clear that the legitimate public interest in addressing discrimination by significant and important professional and commercial centers would not be served by inclu-

sion of religious and benevolent organizations, and inclusion would deplete limited enforcement resources.

Appellant argues that the strict scrutiny test should apply because Local Law 63 impinges on individual rights of intimate and expressive association. Appellant has failed to demonstrate even a colorable claim to such rights on the part of its member clubs or that these rights would be impinged upon by the ordinance. The exemption of Local Law 63 furthers the compelling state interest in eliminating discrimination in important and significant professional and commercial centers and is tailored to achieve this end as reflected by the limiting terms of the ordinance.

Local Law 63 should be upheld against the unsupported constitutional challenge by Appellant.

ARGUMENT

I. NEW YORK STATE CLUB ASSOCIATION MEMBER CLUBS HAVE NO CONSTITUTIONAL RIGHT TO DISCRIMINATE AGAINST WOMEN AND MINORITIES

As often recognized by this Court, the constitutional protection of freedom of association encompasses distinct associational interests. The first is the right of intimate association, closely linked to the right of privacy, and which protects certain relationships from state intrusion. The right of intimate association enables an individual to freely select his or her intimate associates. *Moore v. East Cleveland*, 431 U.S. 494 (1977); *Zablocki v. Redhail*, 434 U.S. 374 (1978). The second is the right of expressive association, which is founded upon the fundamental rights of the First Amendment. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

Freedom of intimate association secures the individual's right of privacy against unwarranted governmental intrusion

and interference.¹ Intimacy, in the constitutional sense, is a term of art with narrowly defined boundaries. The Court has described intimate associations as:

those that attend the creation and sustenance of a family — marriage, e.g., *Zablocki v. Redhail* [434 U.S. 374, 383-386 (1978)]; childbirth, e.g., *Carey v. Population Services International* [431 U.S. 678, 684-686 (1977)]; the raising and education of children, e.g., *Smith v. Organization of Foster Families* [431 U.S. 816, 844 (1977)]; and cohabitation with one's relatives, e.g., *Moore v. East Cleveland* [431 U.S. 494, 503-504 (1977)]. Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs, but also distinctly personal aspects of one's personal life.

¹There is some question as to whether the New York State Club Association ("NYSCA") has standing to raise this issue. An association may assert representational standing only after meeting the criteria set forth in *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977).

An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

See also, *International Union, United Automobile, Aerospace and Agricultural Workers of America v. Brock*, ____ U.S. ____, 106 S.Ct. 2523 (1986). NYSCA has never established that Local Law 63 would apply to any of its member clubs. As NYSCA's standing is predicated upon the standing of its member clubs, it does not appear to meet the Court's requirements as set forth in *Hunt*. Absent any showing of standing, Appellant is then impermissibly requesting the court to violate "the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws". *Broadrick v. Oklahoma*, 413 U.S. 601, 610-611 (1973); *Accord, Younger v. Harris*, 401 U.S. 37, 52 (1971).

Roberts v. United States Jaycees, 468 U.S. 609 at 619-620 (1984). In short, not all collectives can claim that the Constitution protects their right to be intimate.²

In *Roberts*, the Court identified various objective factors which may be used in analyzing the constitutional intimacy claims of an association. *Roberts*, 468 U.S. at 620. Those factors include the size of the association, the nature and number of interactions among members and nonmembers, and the selectivity of the association. See *Roberts*, 468 U.S. 609, 618; *Board of Directors of Rotary International v. Rotary Club*, ___ U.S. ___, 107 S. Ct. 1940, 1946 (1987). Local Law 63 utilizes these factors to establish an objective three prong test to determine whether not an association is public in nature and effect. When an association has 400 members, regularly serves meals, and regularly receives income for commercially related transactions with nonmembers, it is not permitted by the ordinance to engage in discriminatory practices under the guise of constitutionally protected intimacy claims.

After extensive public hearings which formed the basis for a legislative determination, the City of New York found that an organization with over four hundred members which regularly provides meal service and regularly receives payments from nonmembers for services in furtherance of business is simply too large, too commercial, and too pivotal to professional employment opportunities to be considered an association of social intimates. As noted by this Court, a "large business enterprise" is unprotected by constitutional privacy concerns. *Roberts*, 468 U.S. at 620. The organizational attributes re-

²The associations previously recognized by this Court as embodying the highly personal attachments which give rise to intimate associative rights are very different from the group of 400 identified by Local Law 63. Recognition of intimate associative status for this kind of large and comparatively impersonal association would stretch the substantive due process right, whose emergence is charted in the cases cited here, far beyond the limits previously suggested by this Court. See generally, Karst, *The Freedom of Intimate Association*, 89 Yale Law Journal 624 (1980).

quired by Local Law 63 identify with sufficient constitutional precision the "large business enterprise" prohibited from claiming intimate association status.³

Appellant asserts that its member clubs are highly selective and that their selectivity confers a right of intimate association. No factual information in the record supports this assertion. Selectivity in and of itself does not cloak an organization with a constitutionally cognizable right of intimate association. *Rotary* at 1946. Appellant further argues (again without factual support) that its member clubs require applicants to be sponsored by current members, and, as a result, a magically interlocking chain of 400 or more intimate relationships is created that gives each organization a patina of intimacy. *Brief for Appellant*, 25. This argument would effectively bootstrap every quasi-social congregation into an intimate association, no matter how large or how tied to commerce. Under Appellant's analysis, socially connected neighbors could deny blacks membership to community-owned parks. Law firms could deny women partnership because of the intimate associations among existing partners. This Court has never found constitutional support for such a position and has held to the contrary. *Tillman v. Wheaton-Haven Recreational Association*, 410 U.S. 431 (1973); *Hishon v. King & Spaulding*, 467 U.S. 69 (1984).

³Appellant contends that Local Law 63 erroneously fails to consider demographics in determining intimacy. *Brief for Appellant*, 25 ("In Manhattan, however, a club of 1,000 members could be insignificant.") Appellant fails to comprehend the fundamentally local nature of ordinances such as Local Law 63. Local Law 63 embodies the factual finding of the municipal government of the City of New York that membership of 400 or more, in conjunction with the other two requirements is of substantial commercial significance in New York. Other municipalities may determine that a numerically smaller or larger membership is commercially significant in their own localities. Neither Local Law 63 nor the Los Angeles ordinance presumes to make any such factual assessment on behalf of another governmental entity.

Appellant further complains that Local Law 63 does not consider either the selectivity or purpose of an organization. *Roberts* at 626 (citing these as factors to be considered in placing an organization on the spectrum of intimacy). Once again, no facts are provided to the Court about the associations that are represented by NYSCA. Instead, NYSCA claims that selectivity, *per se*, entitles an organization to engage in invidious discrimination. This Court flatly rejected that view in *Rotary*. *Rotary* at 1946. In *Rotary* it was undisputed that the clubs were selective but the Court nonetheless held that California could, constitutionally, apply its anti-discrimination law to the Rotary clubs. Elitism on a grand scale does not confer a right of intimate association. As the number of persons chosen to participate in a group increases, the selective nature of that group is necessarily diminished⁴ Cf. *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Moore v. East Cleveland*, 431 U.S. at 503-504. An intermittent and fragmented gathering of 400 people does not create a substantive due process or privacy right to be free from state or city anti-discrimination legislation and to grant a right of intimate association to such a group would extend that freedom far beyond the parameters previously suggested by this Court.

Appellant's argument that Local Law 63 fails to include examination of an organization's purpose is belied by the ordinance itself. By creating the exception for religious organizations and benevolent orders, the City of New York has acknowledged the only organizational purposes that automati-

⁴Appellant contends that its member clubs are selective given the size of the population. This ratio of individuals granted membership to the population of the City of New York is a false hypothesis. The true population to be measured against this claim of selectivity consists of adults who have substantial prestige in the community, the financial means to meet the relatively expensive membership fees (or who are professionals whose employers deem it good business to purchase memberships) and have a commercial or social relationship with at least two current club members. A group of 400 or more such individuals in Manhattan or Los Angeles cannot be considered few or inconsequential.

cally exempt an affiliation from the operation of the ordinance. Any more detailed discussion of purpose would put the statute at odds with the First Amendment prohibition against content-based regulation. *Roberts*, 468 U.S. at 623; *Airport Commissioners of Los Angeles v. Jews for Jesus*, ___ U.S. ___, 107 S. Ct. 2568 (1987); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975); *Grayned v. City of Rockford*, 408 U.S. 104 (1972). The City of New York made a legislative determination that organizations which possess all three of the enumerated attributes are sufficiently commercial or professionally oriented to create a legitimate public interest in prohibiting discrimination by these organizations. When the public regularly subsidizes bigotry, the state may rightly intervene.

'The man who goes by himself or with his family to a public place must expect to meet and mingle with all classes of people. He cannot ask, to suit his caprice or prejudice or social views, that this or that man shall be excluded because he does not wish to associate with them. He may draw his social line as closely as he chooses at home or in other private places, but he cannot [sic] in a public place carry the privacy of his home with him, or ask that people not as good or great as he is shall step aside when he appears.'

Bell v. Maryland, 378 U.S. 226, 313 Fn. 32 (1964), quoting *Ferguson v. Gies*, 82 Mich. at 363, 367-368, 46 NW, at 720, 721.

'Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.'

Bell v. Maryland, 378 U.S. at 314, n. 33, quoting *Munn v. Illinois*, 94 U.S. 113, 125-26.

The factors embodied in Local Law 63 are calculated to detect the degree of an organization's commercial, business and professional interests, and consequently the extent to

which the state may proscribe invidious discrimination by that organization. The clubs subject to the ordinance's provisions are at a point on the spectrum of personal attachments far outside those protected by the right of intimate association. The denizens of these clubs have, by their number, by the regular inclusion of nonmembers, by their professional, business and commercial activities, forfeited their right to ban from membership those who do not share their race or gender.

Freedom of expressive association is the second associational freedom identified by this Court. *Board of Directors of Rotary International v. Rotary Club of Duarte*, —U.S.—, 107 S.Ct. 1940 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). Freedom of expressive association guarantees collective manifestation of the individual's right to speak, petition and worship.

Appellant quotes Alexis de Tocqueville as nostalgic proof of the fundamental need for associative freedoms. *Brief for Appellant*, 15. Attractive and sentimental as this theory of natural law may be, the American penchant for group activity has been discussed more pragmatically by another commentator:

A group or association has two aspects: it defines some persons in, and some persons out. People joined together in groups not simply for mutual help, but to exclude, to define an enemy, to make common cause against outsiders. Organization was a law of life, not merely because life was so complicated, but also because life seemed so much a zero-sum game . . . Classic English law was a law of and for an elite. In America, more and more people had a stake in the system. This meant that law was necessary and accessible, to a broad and diverse middle class; that law could serve as a social instrument of great power. Hence the struggle to control the operations of law.

L. Friedman, *A History of American Law* 297 (1973).

Professor Friedman's analysis particularly applies to the actions and attitudes of the New York State Club Association

member clubs. Appellant's fear that their sanctuaries of power will be opened to women and minorities speaks eloquently of the nature of, and the need for, democratized access to the castles of power.

The Court has acknowledged the importance of freedom of association in guaranteeing the right of all people to make their voices heard on public issues:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.

Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 295 (1981), quoting *NAACP v. Alabama* 357 U.S. 449, 460 (1958). See also, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in the pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Roberts, 468 U.S. at 622.

Appellant has not identified the expressive purposes, if any, of any of its member clubs. Further, it makes no claim that any of the expressive ends identified in *Roberts* are relevant to its member clubs. The record is devoid of any evidence indicating that member clubs are devoted to politics or other forms of advocacy or social activism.

NYSCA does contend that "a significant number of these member [clubs] intentionally have been organized along national, origin, religion, ethnic and gender lines . . ." Joint Appendix ("JA") JA 32. This bare assertion is too vague to enable this Court to conclude that application of Local Law 63 will do harm to any NYSCA member's expressive associational

rights. In contrast, when deciding both *Rotary* and *Roberts*, this Court was presented specific information about the clubs' organizational purposes. Indeed, in *Roberts*, the club's members had formed for express political purposes but this Court nonetheless did not exempt the Jaycees from the Minnesota non-discrimination ordinance. *Roberts*, 468 U.S. 627. The compelling state interest in eliminating invidious discrimination justified any incidental infringement on the organization's political purposes.

As for the NYSCA itself, the sole stated purpose of NYSCA is the promotion of its member clubs. JA 32-33.

Where the political, social, economic, educational, or religious message of an expressive association is not changed by the admission of women and minorities, the association suffers no harm by integration. Appellant contends that associations organized along "single gender lines [are] an expression of their belief that certain types of social intimacy and discourse may only be achieved in single sex settings." *Brief for Appellant*, 34. This statement presumes an intimacy belied by the size and commercial activities of its members. Moreover, Appellant never identifies what effect admission of women would have upon social intimacy and discourse. The NYSCA tries to bootstrap selectivity into a political and therefore expressive agenda. Appellant continually emphasizes that selectivity is the distinguishing feature and "raison d'être" of its member organizations. JA 32. As selectivity, in and of itself, does not afford constitutional protections, Appellant must articulate the expressive purpose served by this selectivity. Insofar as the record reveals, Appellant member clubs embody neither the privacy concerns that support the right of intimate association nor speak in the unified political or social voice that animates expressive associational freedom. As noted in *Roberts*, selectivity is but one factor used to assess the relative intimacy of an association. Appellant's brand of sprawling

selectivity is not a constitutionally cognizable political or philosophical position.⁵

Appellant argues that an association of blacks would be required to accept whites and a women's group to accept men. This would only be true if those organizations met all three prongs of Local Law 63. Assuming that such groups would fall within the proscription of the ordinance, Appellant fails to show how an organization devoted to the promotion of gay business concerns is robbed of purpose by the admission of sympathetic heterosexuals. A group concerned with women's rights is not automatically subverted because of male participation (witness WLALA) nor does the Italian anti-defamation league necessarily lose its fight against ethnic bias by counting like-minded non-Italians among its members.

In *Roberts*, the Court noted that the Jaycees "failed to demonstrate that the Act imposes any serious burdens on the male members freedom of expressive association." 468 U.S. at 626. *See also, Rotary*, ___ U.S. at ___, 107 S.Ct. at 1947. Appellant offers only the tenuous assertion that admission of women (and minorities) may dilute a "symbolic message conveyed by the very fact that women [and minorities] are not permitted to vote." *Roberts*, 468 U.S. at 627. *See also, Hishon v. King & Spaulding*, 467 U.S. 69 (1984). The record here is bereft of any evidence which would support such a claim. Appellant cites the selectivity of member clubs as their saving political feature, mistaking *a priori* discrimination for promotion of a stated political purpose.

⁵A group of over four hundred implies selective characteristics which define a large pool. In Los Angeles, the City Council found that the ordinance as drafted would affect those clubs which require membership applicants to hold important positions in the city's political or commercial circles, to possess considerable financial status, and to be socially or commercially connected to at least two existing members of the club. Not surprisingly, these characteristics apply to well over 400 persons residing in the City of Los Angeles. The pool of otherwise qualified potential members decreases when gender or race requirements are added.

[D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby robs persons of their individual dignity and denies society the benefits of wide participation in political, economic and cultural life . . . [A]cts of invidious discrimination in the distribution of publicly available goods, services and other advantages⁶ cause unique evils that government has a compelling interest to prevent — wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection.

Roberts, 468 U.S. at 625, 628. *Accord*, *NAACP v. Claiborne Hardware*, 458 U.S. at 915.

The State has a compelling interest in eliminating invidious discrimination in organizations as large and as oriented to commercial, business and professional interests as those to which Local Law 63 would apply. *See, Roberts*, 468 U.S. at 623 ("the right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.") This Court has stated that even if an organization has some political, social, economic or religious purpose, courts are to balance any injury to the expressive purpose against the compelling state interest served by the ordinance. *Rotary*, ____ U.S. ____, 107 S.Ct. 1947-48.

⁶*Accord, Rotary* ____ U.S. at ____, 107 S.Ct. at 1948. "In *Roberts* we recognized that the State's compelling interest in assuring equal access to women extends to the acquisition of leadership skills and business contacts as well as tangible goods and services."

Even if admission of women and minorities would in some unspecified way impair the expressive associational freedoms of an organization having over 400 members, providing regular meal service, and engaging in economic exchanges with non-members in the furtherance of business, any potential impairment is far outweighed by the State's interest in protecting the rights of all its citizens. Local Law 63 was adopted by the City of New York in order to guarantee its citizens equal access to associations of political, social, economic, and cultural significance that by their nature are not distinctly private. Local Law 63 is a content-neutral ordinance which serves only to proscribe invidious discrimination by large clubs regularly supported by public funds.

Local Law 63 and its Los Angeles counterpart only serve to secure women and minorities the opportunity to participate equally in those commercial and professional arenas that have become large and public enough to fall within the statutes' reach. The ordinance addresses no social issue other than the premise that an organization of over 400 members which regularly serves meals and which regularly receives stipends from nonmembers cannot claim a private right to discriminate.

As with any large, commercial facility, individual members may immediately express whatever bigotry they choose. They may refuse to sit next to a Jew, turn their backs on a woman, or leave the room when a black enters. They may not, however, deny to women and minorities entry and full enjoyment of club facilities based upon gender and race distinctions and claim constitutional approval for the denial.

II. LOCAL LAW 63 DOES NOT ENCROACH UPON ANY CONSTITUTIONALLY PROTECTED RIGHT OF ASSOCIATION, SPEECH OR PRIVACY

In a facial challenge to the overbreadth . . . of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally pro-

ted conduct. If it does not, then the overbreadth challenge must fail.

Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494 (1982) (footnotes omitted).

"The crucial question, then, is whether the ordinance sweeps within its prohibitions that which may not be punished under the First and Fourteenth Amendments." *Grayned v. City of Rockford*, 408 U.S. 104, 114-15 (1972). See also, *Airport Commissioners of Los Angeles v. Jews for Jesus*, ____ U.S. ____, 107 S.Ct. 2568 (1987); *City of Houston v. Hill*, ____ U.S. ____, 107 S.Ct. 2502, 2508 (1987); *Broadrick v. Oklahoma*, 450 U.S. 107 (1973); *Democratic Party of the United States v. Wisconsin*, 413 U.S. 601, 611-13 (1981).

Appellant flatly asserts that Local Law 63 is unconstitutionally overbroad and will have a chilling effect upon the ability of other organizations to associate freely for political, social, economic, cultural or religious ends. Brief for Appellant, 40. This conclusory analysis fails to consider Local Law 63 as a manifestly conjunctive test in which all three prongs must be met before an organization would be subject to regulation. Thus, an organization would be affected only if its membership exceeded 400, regular meal service was provided, fees for dues and services were regularly accepted for or on behalf of nonmembers, and the association invidiously discriminated against women and minorities.

Appellant's overbreadth argument is necessarily premised upon the same flawed associational analysis discussed above. The organizations affected by Local Law 63 have membership figures that are too large and activities which are too commercial to sustain the frail notion that a protected activity might be adversely affected by the ordinance. Cf. *United States v. Robel*, 389 U.S. 258, 265-266 (1967).

Appellant raises the spectre of suppression of political and religious speech without citing any plausible supporting examples. It is difficult to conceive of a political or religious

association which would exclude women and minorities as part of its group message and would also possess the three attributes of Local Law 63. White supremacist groups, for example, do not generally have dining facilities which regularly serve nonmembers nor are members' dues and fees regularly financed by nonmembers in the furtherance of trade or business.

Moreover, Appellant's supposition that these imagined political and religious groups subject to Local Law 63 would be forced to admit "members whose views are antagonistic to those of the association," *Brief for Appellant*, 40, presumes that all women and minorities subscribe to the same ideology. The assumption that women and minorities are not capable of holding views as equally noxious as any other group is simply another "stereotypical notion . . . [which] deprives persons of their individual dignity and denies society and benefits of wide participation in political, economic and cultural life." *Roberts*, 468 U.S. at 625.

Local Law 63 is not overbroad as it would not impair a substantial or even significant number of constitutionally protected intimate or expressive associations. Even if some as yet unidentified group might be dissuaded from an activity by the ordinance

the chilling effect that admittedly can result from the very existence of certain laws does not in itself justify prohibiting the State from carrying out the important and necessary task of enforcing these laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and the Constitution.

Younger v. Harris, 401 U.S. 37, 51-52 (1971).

The State's compelling interest in prohibiting invidious discrimination which deprives women and minorities of "leadership skills and business contacts," *Rotary*, ____ U.S. ____, 107 S.Ct. at 1948, overrides the conjectural chilling effect Appellant suggests. "We have never held that a statute should

be held invalid on its face merely because it is possible to conceive of a single impermissible application." *City of Houston v. Hill*, ____ U.S. ____, 107 S.Ct. at 2508, quoting *Broadrick v. Oklahoma*, 413 U.S. at 630. Cf. *New York v. Ferber*, 458 U.S. 747 (1982).

Appellant argues that the statute will have an unconstitutional effect on speech rights, claiming that the only way for member clubs to lawfully continue to discriminate will be for club members to censor commercial topics from their conversations. Inasmuch as the ordinance applies only where payment is accepted from or on behalf of nonmembers in the furtherance of trade or business, its affect on speech, if any, is limited to commercial speech.

In overbreadth analysis, commercial speech is analytically distinguished from noncommercial speech. *Brief for Appellant*, 40. *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 n. 7 (1980). The rationale for applying the overbreadth doctrine "applies weakly, if at all, in the ordinary commercial context." *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977).

Finally, it is irrelevant whether the ordinance has an overbroad scope encompassing protected commercial speech of their persons, because the overbreadth doctrine does not apply to commercial speech.

Flipside, 455 U.S. at 496-497; *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 565 n. 8 (1980).

Local Law 63 also is not so vague as to be susceptible to unconstitutional application. Appellant would distinguish the Court's decision in *Roberts* on the grounds that the Minnesota Supreme Court had an

articulated willingness to adopt a limiting construction that would exclude private groups from the statute's reach, [which] together with the commonly used and

sufficiently precise standards it employed to determine that the Jaycees is not such a group, establish[ed] that the Act, as currently construed, [did] not create an unacceptable risk of application to a substantial amount or protected conduct.

Roberts, 468 U.S. at 630-631.

By mounting a facial challenge to Local Law 63 prior to any enforcement attempts, Appellant has preempted any expression of judicial willingness to adopt a limiting construction of the ordinance. A limiting judicial construction may not be constitutionally mandated. However, the preamble to Local Law 63 provides the very type of guidance utilized by the Minnesota Supreme Court in *Roberts*. JA 15-16. Moreover, the terms of the ordinance (e.g. "regular") are terms of common usage and the New York City Commission on Human Rights has adopted precise definitional regulations which clarify any ambiguities in the statute. JA 69-72.

Appellant argues that the ordinance is comprised of a set of fictional criteria created by the City of New York arbitrarily to work a harm on private clubs. The precise standards contained in Local Law 63 are not figments of the collective imagination of the City Council of the City of New York, but rather their findings as the body entrusted by the people with the function of legislative inquiry and redress, that clubs which possess all three characteristics are not private associations. As organizations meet these criteria, they are enjoined from perpetuating discrimination against women and minorities in the local business arena. Were the statute to contain the less certain standards suggested by Appellant, it would then become fatally vague and overbroad. See e.g., *Brief for Appellant*, 27.

Finally, Appellant makes much of its conclusion that Local Law 63 creates an irrebuttable presumption in determining which organizations are not distinctly private. This analysis fails to consider that portion of the ordinance which excludes any association "which proves that it is in its nature distinctly

private." JA 17 (Local Law 63). Given that Appellant has mounted a facial challenge to Local Law 63, it would be premature to characterize the statute as creating an irrebuttable presumption. However, assuming that an irrebuttable presumption were established, the law would not necessarily become invalid. Irrebuttable presumptions are only proscribed when they impair some separate constitutional right. *See, e.g. Vlandis v. Kline*, 412 U.S. 441 (1973). As Local Law 63 affects no constitutionally cognizable right of association, speech or privacy, an irrebuttable presumption would not be fatal to the ordinance.

III. LOCAL LAW 63 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

The Equal Protection Clause commands that legislative classifications must be drafted so that "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216, quoting *F.S. Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). However, this mandate does not require that "things which are different in fact or opinion to be treated in law as though they were the same." *Plyler* at 202, quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940).

The constitutional inquiry as to most state enactments is whether a legislative classification bears some rational or fair relationship to a legitimate public purpose. Generally, classifications according to race, gender, and alienage, and those that impinge upon fundamental rights require the State to demonstrate that the classification is tailored to further a compelling state interest. *Plyler* at 217.

Appellant's Equal Protection argument proceeds upon two erroneous assumptions. First, that the organizations affected by Local Law 63 are similarly situated to religious organizations and benevolent orders, and second, that Local Law 63 impinges upon some constitutionally recognized personal right.

Local Law 63's express exclusion of benevolent orders and religious organizations reflects factual findings of the City Council of the City of New York. The Council found that the general objective of the ordinance to prevent "the discriminatory practices of certain membership organizations where business deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed," would not be served by inclusion of these associations. JA 15.

The initial discretion to determine what is "different" and what is the "same" resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill.

Plyler v. Doe, 457 U.S. 202, 216.

Appellant's examination of the minor statutory similarities between associations subject to Local Law 63 and those exempted from its provisions does not focus upon the economic and social differences between the religious and benevolent organizations, on the one hand, and associations of over 400 persons which regularly serve meals and permit the paid participation in business and professionally oriented activities on the other, as determined by the City Council of New York.

The only similarity demonstrated by the NYSCA between the organizations subject to Local Law 63 and those exempted is that both groups share the characteristic of being associations. *Cf., Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). Nowhere in the record is there any showing that members of benevolent orders and religious associations share the prestige afforded members of NYSCA clubs, expend the same sums for membership, enjoy reimbursement for club fees from their employers, regularly enjoy meals at club facilities, or engage

in significant social, commercial, political or cultural transactions.

Contrary to Appellant's assertion, this Court has never held that "an absence of evidence cannot serve as a rational basis for a statutory classification. . ." (*Brief for Appellant*, 44.) In *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), this Court rejected a challenge to a zoning ordinance directed at adult theaters, holding that the ordinance was not "under-inclusive" because it failed to regulate other kinds of adult businesses.

There is no evidence that, at the time the Renton ordinance was enacted, any other adult business was located in, or was contemplating moving to, Renton. In fact, Resolution No. 2368, enacted in October 1980, states that the City of Renton does not, at the present time, have any business whose primary purpose is the sale, rental, or showing of sexually explicit materials.

City of Renton v. Playtime Theaters, Inc. at 55.

In a comparable exercise of legislative prerogative, the Council of the City of New York included an exemption to Local Law 63 "[b]ecause small clubs, benevolent orders and religious organizations have not been identified in testimony before the Council as places where business activity is prevalent . . ." (JA 15). There is no basis on the record, as presented to the Council of the City of New York or by Appellant herein, for assuming that New York will not, in the future, amend the ordinance to include other kinds of associations that have been shown to produce the same discriminatory effects on professional and business advancement opportunities for women and minorities as those associations currently subject to Local Law 63. Cf. *City of Renton* at 55-56; *Borden's Farm Products Co. v. Ten Eyck*, 297 U.S. 264, 272 (1935) (record and legislative history "silent" as to reason for classification).

Even assuming that benevolent orders and religious organizations are similarly situated to NYSCA members, Local

Law 63's exemptions are more than rationally related to legitimate public purposes. The City of New York has a legitimate interest in avoiding interference with as well as sponsorship of religious organizations. *Walz v. Tax Commission*, 397 U.S. 664 (1970). Exemption of benevolent orders is based not only upon the findings of the City Council that benevolent orders do not work the harm sought to be remedied by the ordinance but also serves the legitimate State interest in applying its limited resources to associations that have a substantial commercial impact. The state has no duty to extend its reach as far as possible. See, e.g., *Selective Services System v. Minnesota Public Interest Research Group*, 468 U.S. 795 (1984).

Equal Protection analysis requires a determination of whether a law infringes a right which has its source, explicitly or implicitly, in the Constitution. "In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and the circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).

The general rule that legislation is presumed to be valid and should be sustained if its classifications are rationally related to a legitimate state interest gives way when state law impinges on personal rights protected by the Constitution. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). Laws which interfere with personal rights are subject to strict scrutiny. Appellant urges that the strict scrutiny test should be applied to Local Law 63 but fails to identify what personal rights are affected by the ordinance. Appellant treats the discussion of compelling state interest in *Rotary* as conferring upon all associations constitutionally recognized personal rights, while ignoring the Court's finding that the Unruh Act at issue in *Rotary* did not impinge on the freedom of private association nor the freedom of expressive association of the

Rotary Club. *Rotary* at 1947.⁷ "State legislation does not violate the Equal Protection Clause merely because the classifications [it makes] are imperfect." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 501-502 (1979) quoting *Dandridge v. Williams*, 397 U.S. 471, 485.

Even assuming that Local Law 63 does work some slight infringement on members' right of intimate or expressive association, "that infringement is justified because it serves the State's compelling interest in eliminating discrimination" in cultural, social, economic and commercial centers. *Rotary* at 1947. Moreover, Local Law 63 is narrowly drawn to serve this interest by its express exclusion of organizations which are not such centers and by limiting its prohibitions to invidious discrimination. Local Law 63 does not require affirmative action by NYSCA members; it simply requires that women and minorities not be denied access to these important centers solely because of their race or gender.

⁷Appellant's citation to *Williams v. Rhodes*, 393 U.S. 23 (1968) repeats this syllogism. The Ohio election law struck down in *Williams* was found to effect profoundly the right of individuals to associate for the advancement of political beliefs. As demonstrated, *supra*, Appellant has failed to show how the political message of its member clubs, if organized for such purposes, will be changed by the admission of like-minded women and minorities. Nothing in Local Law 63 prevents the formation of political associations.

CONCLUSION

Appellant asks that this Court find a new, expanded right of intimate and expressive association on behalf of business oriented organizations which have over 400 members, regularly serve meals and regularly derive income from nonmembers using club facilities for commercial purposes. Yet Appellant has failed to provide information about the nature of its member clubs that might demonstrate the alleged infringement of their personal rights. The New York ordinance represents a legislature's careful determination as to how best achieve a compelling state interest and should not be vulnerable to a facial challenge. For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

PAMELA A. ALBERS, Deputy City Attorney
COUNSEL OF RECORD

LOS ANGELES CITY ATTORNEY'S OFFICE
(JAMES K. HAHN, City Attorney)
VANESSA PLACE, Deputy City Attorney
200 North Main Street — 1600 CHE
Los Angeles, California 90012

(213) 485-5030

for The City of Los Angeles

Kim McLane Wardlaw

for Women Lawyers' Assoc. of L.A.

MICHAEL P. REYNOLD, City Solicitor

JOHN R. SHERIDAN, Asst. City Solicitor
for the City of Wilmington, Delaware

Attorneys for Amici in Support of Appellees

Dated: January 13, 1988

APPENDIX

Ordinance No. 162426:

An ordinance adding Article 5.9 to Chapter IV of the Los Angeles Municipal Code re prohibition against discrimination by club or organizations which are not distinctly private.

**THE PEOPLE OF THE CITY OF LOS ANGELES
DO ORDAIN AS FOLLOWS:**

Section 1. Article 5.9 is hereby added to Chapter IV of the Los Angeles Municipal Code to read as follows:

ARTICLE 5.9

**PROHIBITION AGAINST DISCRIMINATION BY
CLUBS OR ORGANIZATIONS WHICH ARE NOT
DISTINCTLY PRIVATE**

SEC. 45.95.00. FINDINGS AND PURPOSE:

After public hearing receipt of testimony, the City Council finds and declares:

That a significant barrier to the advancement of women and minorities in the business and professional life of the City exists by virtue of the discriminatory practices of certain clubs or organizations which are not distinctly private and where business is frequently conducted.

That while such clubs or organizations may avowedly be formed for social or civic purposes, the extent to which many of the activities therein have had a prejudicial impact on the business, professional and employment opportunities of women and minorities cannot be ignored or minimized.

That business activity most frequently occurs in clubs or organizations having more than four hundred members which provide regular meal services which facilitates conducting such business.

That the dues and expenses of members at such clubs or organizations are often paid by their employers because the employee's activities at said clubs or organizations serve to develop and enhance the employer's business.

That such clubs or organizations also rent their facilities for use as conference rooms for business meetings attended by non-members.

That the City of Los Angeles has a compelling interest in eradicating discrimination based on sex, race, color, religion, ancestry, national origin, sexual orientation, or disability in order to assure all of its citizens a fair and equal opportunity to participate in the business and professional life of the City. Conduct and practices which exclude persons from entry or consideration for membership in or the full advantages and privileges of such membership on these bases are discriminatory and unacceptable, are injurious to the body politic and to the business community and the City of Los Angeles. Accordingly, the City's interest in eliminating such practices in clubs or organizations covered by the Article outweighs the interest of their members in private association.

SEC. 45.95.01. DEFINITIONS:

A. For purposes of this Article, a club or organization (hereafter "club") which is not distinctly private is any organization, institution, club or place of accommodation which satisfies the following requirements:

1. Has membership of whatever kind totalling 400 or more; and

2. Provide regular meal service by providing either directly or indirectly under a contract with another person, any meals on three or more days per week during two or more weeks per month during six or more months per year; and

3. Regularly accepts payments:

(a) from non-members for expenses incurred at the club by members or non-members in the furtherance of trade or business; or

(b) on behalf of non-members for expenses incurred at the club by non-members in the furtherance of trade or business.

B. "Regularly accepts payment" as used in this Article shall mean a club accepting as many during the course of a year as the number of weeks any part of which the club is available for use by members or non-members per year; the payments may be for dues, fees, use of space, facilities, services, meals or beverages.

C. "Furtherance of trade or business" as used in this Article shall mean payment made by or on behalf of a trade or business organization, payment made by an individual from an account which the individual uses primarily for trade or business purposes, payment made by an individual who is reimbursed for the payment by the individual's employer or by a trade or business organization, or other payment made in connection with an individual's trade or business, including entertaining clients or business associates, holding meetings or other business-related events.

**SEC. 45.95.02. PROHIBITION AGAINST
DISCRIMINATION:**

A. It shall be unlawful for a club which is not distinctly private to deny to any person entry to facilities at, membership in, or the full enjoyment of said club or organization on the basis of sex, race, color, religion, ancestry, national origin, sexual orientation, or disability.

B. The provisions of this Article shall not apply to an institution organized and operated exclusively for religious purposes as defined in 26 U.S.C. Section 501(c)(3).

SEC. 45.95.03. ENFORCEMENT AND PENALTIES:

A. Civil Action.

Any person may enforce the provisions of this Article by means of a civil action. The City of Los Angeles may also enforce the provisions of this Article by means of a civil action.

B. Injunctions.

1. Any person who commits an act, or proposes to commit an act, or engages in any pattern and practice of discrimination in violation of Section 45.95.02 may be enjoined therefrom by any court of competent jurisdiction.

2. Action for injunction under this subsection may be brought by any aggrieved person, by the City Attorney, or by any person or entity who will fairly and adequately represent the interest of the protected class.

C. Penalties.

Any person who violates, or aids or incites another person to violate, the provisions of this Article is liable for each and every such offense for the actual damages, and

such amount as may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than Two Hundred Fifty Dollars (\$250), and such attorney's fees and court costs as may be determined by the court in addition thereto, suffered by any aggrieved party. In addition, the court may award punitive damages in a proper case.

D. Non-exclusive Remedies and Penalties.

Nothing in this Article shall preclude any person from seeking any other remedies, penalties or procedures provided by law.

SEC. 45.95.04. NON-CRIMINAL PENALTIES:

Notwithstanding any provision of this code to the contrary, no criminal penalties shall attach for any violation of the provisions of this Article.

Sec. 2 The City Clerk shall certify to the passage of this ordinance and cause the same to be published in some daily newspaper printed and published in the City of Los Angeles.

6a

I hereby certify that the foregoing ordinance was passed by the Council of the City of Los Angeles, at its meeting of May 26, 1987.

ELIAS MARTINEZ, City Clerk,

By Jacqueline R. Stacy,
Deputy.

Approved May 28, 1987

Tom Bradley,
Mayor.

File No. 87-0288

7a

File No. 87-0288

**TO THE COUNCIL OF THE
CITY OF LOS ANGELES**

Your **PERSONNEL AND LABOR RELATIONS** Committee reports as follows:

	<u>Yes</u>	<u>No</u>
Public Comments	<u>X</u>	<u> </u>

RECOMMENDATION

In order to eliminate a significant barrier to the advancement of women and minorities in the business and professional life of the City of Los Angeles created by the discriminatory membership practices of certain clubs or organizations "not distinctly private" in nature, we **RECOMMEND** in accordance with the Motion (Picus — Russell, et al), that the accompanying ordinance **BE ADOPTED**, in order to add Article 5.9 of Chapter IV (Sections 45.95.00 through 45.95.04) to the Los Angeles Municipal Code to prohibit discriminatory membership practices of clubs or organizations that are defined as being "not distinctly private" based on sex, race, color, religion, ancestry, or national origin. A club or organization shall be considered "not distinctly private" if it satisfies the following criteria:

1. Has more than four hundred members; and,
2. Provides regular meal service; and,
3. Regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for furtherance of trade or business.

SUMMARY

Your Committee considered the Motion (Picus — Russell, et al) proposing the adoption of an ordinance to bar discrimination in membership by clubs or organizations which are "not distinctly private".

As noted in the Motion (Picus — Russell, et al), the City of Los Angeles has long promoted equal opportunity in employment. Although laws have been enacted to eliminate discrimination in employment, women and minorities have not yet attained equal opportunity in business and the professions.

One barrier to the advancement of women and minorities in the business and professional life of Los Angeles, is the discriminatory membership practices of certain clubs and organizations where business deals are often made and where personal contacts invaluable for business, employment and professional advancement are formed.

Such organizations claim to be private clubs. However, business meetings and related activities often occur at these clubs. Furthermore, the dues and expenses of the members are generally paid by their employers, since the employee's activities, including hosting and entertaining current or prospective clients, unquestionably furthers the employer's business interests. In addition, such clubs or organizations, rent facilities through its members for use as business meetings which are attended by nonmembers. Such practices clearly provide benefits to the businesses involved and to persons other than members. Clearly, such clubs are undeniably "not distinctly private" in nature.

Your committee conducted two extensive public hearings attended by the City Controller, representatives of

several other elected officials, business professionals, representatives from civic and community associations, and public advocacy groups all of whom universally recommended approval of the proposed ordinance. Your Committee also received a number of communications from associations and public officials in support of the proposal, but who could not make a personal appearance.

Your Committee notes that several speakers at the hearings felt that the ordinance did not go far enough. They suggested that the size of a club's membership should be smaller, that fines for non-conformance should be higher, and that the disabled should be included as a protected class.

In accordance with the subject Motion, the City Attorney has submitted a proposed ordinance and a report on the legality of such an ordinance. The report discusses in detail appropriate State and Federal law, as well as examining the specific case law that arose as a result of the adoption of the New York City ordinance (proposed ordinance is modeled on the New York experience).

The City Attorney states that adoption of a local ordinance prohibiting discriminatory membership practices by clubs which are "not distinctly private" would neither be preempted by existing state law (the Unruh Act) nor violate constitutional provisions of freedom of association. Section 52(e) of the Unruh Act specifically provides that the Act shall be independent of any other remedies or procedures. As reinforced by an historical note to Section 51.5 of the Act, there is no doubt that the Unruh Act does not preempt other remedial action by local government.

With regard to freedom of association, the City Attorney indicates that according to the provisions of the

Unruh Civil Rights Act, persons within the State, no matter what their sex, race, color, religion, ancestry, or national origin, are entitled to full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind. To the extent that the functions and activities of membership organizations qualify them as "business establishments", they would be subject to the prohibitions against discrimination set forth in the Unruh Act.

Moreover, the City Attorney's report indicates that pertinent case law has consistently held that the government's compelling interest in prohibiting invidious discrimination outweighs the freedom of association interest of those who would discriminate.

The City Attorney's report further notes that California courts have interpreted the phrase "business establishments" in the broadest possible sense for purpose of inclusion within the purview of the Unruh Act. The term "business establishments" has been applied to firms which have "businesslike attributes" and to those facilities or organizations which serve as "public accommodations". The courts have been increasingly willing to scrutinize the practices of organizations which serve as "public accommodations". More importantly, the courts have been increasingly willing to scrutinize the practices of organizations traditionally regarded as private in order to determine if, in practice, they carry on as a "business establishment". If so, this removes the aegis of "freedom of association", which the courts have routinely discovered to be a subterfuge for discriminatory practices.

The New York City Ordinance, on which the proposed City of Los Angeles ordinance is modeled, prohibits discrimination by clubs which are not distinctly private. Under the New York ordinance it would be unlawful to

refuse membership based on sex, race, creed, color or national origin. Any institution, club, or place of accommodation that is distinctly private is excluded from complying with the statute. Those seeking an exemption must prove they are distinctly private. The New York ordinance specifically provides that an institution, club or place of accommodation shall be considered "not distinctly private" if:

1. It has more than four hundred members; and,
2. Provides regular meal service; and,
3. Regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for furtherance of trade or business.

The City Attorney advises that the new York courts found that an organization with 400 members does not constitute a small group which could view itself as exclusive and therefore, entitled to the constitutional privileges of freedom of association. The New York courts also found that the ordinance's requirement that a club receive revenues from nonmembers for the conduct of a trade or business, further undermines any claim of exclusivity. Lower court rulings that the New City Ordinance is constitutional were recently upheld by the New York Court of Appeals (New York's highest State court).

In opposition to the proposed ordinance, your Committee received communications from attorneys on behalf of an association of private clubs within the State of California, from an attorney on behalf of the Jonathan Club, and one of the clubs in Los Angeles that would be affected by the proposed ordinance. Their comments have been thoroughly reviewed by your Committee. The City Attorney's

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Office is still of the opinion that the proposed ordinance is legally permissible.

The City Attorney also reported that the recent United States Supreme Court ruling on the "Rotary Club of Duarte vs. Board of Directors" further reinforces their opinion that the proposed ordinance will withstand legal challenge.

In summary, the City Attorney believes that if the proposed ordinance is adopted and subsequently challenged, it will be along the lines pursued in the New York litigation. Assisted by the case law which has consistently narrowed the definition of "distinctly private" clubs both under the freedom of association approach as well as the "business establishment" definition as contained in the Unruh Act, the ordinance appears to place the City in the most favorably defensible position possible.

Your Committee feels that the attached ordinance, which is modeled after the New York City ordinance, should be adopted as an appropriate response to eliminating the discriminatory membership practices of certain clubs and organizations in the City of Los Angeles.

Respectfully submitted

PERSONNEL AND LABOR
RELATIONS COMMITTEE

JOY PICUS
GLORIA MOLINA

13a

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515
HOWARD L. BERMAN
26TH DISTRICT, CALIFORNIA

April 6, 1987

Honorable Joy Picus
City of Los Angeles
City Hall
Los Angeles, CA 90012

Dear Joy:

I applaud you on your efforts towards ending the discriminatory practice of supposedly "private clubs" in Los Angeles. These clubs clearly provide professional opportunities to their members while their private status remains highly questionable. Only when women and minorities are permitted to fully participate in every aspect of the business world will they obtain full professional equality with their white male colleagues.

You have taken an important step in breaking down the barriers to professional equality. Keep up the good work.

Sincerely,

HOWARD L. BERMAN
Member of Congress

TESTIMONY OF FREDRIC WOOCHEER
BEFORE PERSONNEL & LABOR RELATIONS
COMMITTEE
LOS ANGELES CITY COUNCIL
March 23, 1987

Good morning. My name is Fredric Woocher. I am a staff attorney at the Center for Law in the Public Interest, 10951 W. Pico Blvd., Los Angeles.

I am proud to say that the Center for Law in the Public Interest has had a long involvement in this community in fighting for equal employment opportunities for women and minorities. In the past 15 years, we have achieved notable success in litigating cases seeking to enforce compliance with state and federal employment discrimination laws. (In fact, some of our greatest victories have come against departments and agencies of this city.)

Despite the gains that have been made in this time, however, it is apparent that women and minorities are still not fully integrated into the business world in this community. While these groups have achieved success at the entry levels, they are still woefully underrepresented in the upper echelons and the "executive suites." Studies confirm this regrettable fact: Whereas women now make up greater than 50% of the workforce, only 2% of the top executives nationwide are women; only one of the Fortune 500 companies is headed by a woman — Katherine Graham of the *Washington Post*; and women hold only 3%-4% of the Fortune 1000 directorships.

One reason for the inability of women and minorities to compete effectively in the business world is their exclusion from discriminatory private clubs that foster the business goals of their all-male, mostly white, memberships. These clubs are often informal centers of power in

the business world, affording their members unique opportunities for forging personal contacts and arranging business deals. These clubs are where the up-and-coming executives gain access to the "Old Boys Network." Again, studies confirm the critical role that memberships in such clubs plan in advancing within the business community: A survey conducted on behalf of the American Jewish Committee several years ago found that more than two-thirds ($\frac{2}{3}$) of the corporate leaders surveyed said that memberships in these clubs adds to one's status in the community; more than half ($\frac{1}{2}$) of those surveyed said that members received valuable business contacts in such clubs.

The impact of the clubs' discriminatory practices, of course, is not limited to their effect on the opportunity for professional advancement of women and minorities. There are other negative ramifications, as well: It is, as you have heard from those directly affected, degrading and insulting to those who are excluded or treated as second-class citizens; it creates difficult problems (and forces awkward choices) for those members and would-be members and guests who do not share the clubs' discriminatory views; it deprives our community of the full contributions that can be made by women and minorities; and — perhaps worst of all — it sends the message to the rest of society that women and minorities are second-class citizens, promoting stereotypes from the highest levels of our community and its leaders.

The response over the last decade to the increasing realization of the negative impacts of the clubs' discriminatory practices has been heartening. Numerous private and public entities have acted to combat and bring to an end these exclusive policies. I am glad to say that the California State Bar has been in the forefront of these

efforts: Local and state bar associations have urged their members not to schedule meetings at discriminatory clubs and not to reimburse firm employees for club dues and expenses; the California Judges Association recently amended the Canon of Judicial Ethics to declare it inappropriate for judges to be members of discriminatory clubs.

In addition, many corporations will no longer pay for expenses incurred at discriminatory clubs. Among the leading corporations adopting this policy are ARCO, Bank of America, IBM, and CBS. Here in California, Conway Collis has proposed that the Franchise Tax Board adopt a regulation prohibiting tax deductions to be taken for dues and expenses at discriminatory clubs; a vote on his proposal is expected in the coming weeks.

Even more on point, a number of cities across the country have enacted laws or resolutions designed to end discriminatory policies at private business clubs. Detroit and Philadelphia, for example, have taken action to prohibit city agencies from awarding contracts to any firms that pay for memberships or expenses at discriminatory clubs. More directly, the City of New York has enacted legislation that prohibits discrimination in large clubs where significant business activity occurs.

This last approach is what is needed here in Los Angeles — it is the only way to combat the problem of discriminatory private business clubs directly and effectively. Moreover, the legality of such an ordinance is beyond dispute: the New York City law has withstood challenges in three different courts and was recently unanimously upheld by the highest court in that state. As the United States Supreme Court declared in the *Jaycees* decision, such a law "responds precisely to the substantive problem which legitimately concerns the State and

abridges no more speech or associational freedom than is necessary to accomplish that purpose." (104 S.Ct. at 3255.)

I urge you to enact such a law in the City of Los Angeles.

**CITY OF LOS ANGELES
OFFICE OF CONTROLLER
ANTI-DISCRIMINATION TESTIMONY
OF RICK TUTTLE, MARCH 23, 1987**

It is astounding that in 1987, in the City of Los Angeles, we are still dealing with legislation to prohibit discrimination. America abolished Jim Crow and the segregationist doctrine of separate but equal over 2 decades ago, with the passage of the 1964 Civil Rights Act. A political, legal and indeed moral consensus was established that invidious discrimination would no longer be permitted.

These large business clubs which discriminate are an intolerable aberration in today's world. They trample on any notion that women and minorities have an equal opportunity to make it to the top of the economic ladder.

These clubs are large powerful institutional centers where members negotiate business deals and advance their professional goals. Slamming the membership doors on women and minorities locks them out of the top echelons of power. It is pure and simple white collar discrimination.

We know business is conducted at these clubs. Former U.S. Attorney General William French Smith, for example, a Los Angeles area resident, stated under oath in Senate Hearings that he does in fact deduct his club expenses as business deductions on his income taxes. Just last year, a Lockheed Vice President said that "We have memberships in the California and Jonathan Clubs because they are most useful for conducting business. They provide meeting rooms. They are a business tool used by all large corporations."

It should also be noted that these are the two clubs that are most widely known to discriminate against women

and minorities and are reported to count over 5,500 business and professional leaders as members.

The plan I am recommending combines major components of a 1984 New York City law which prohibits club discrimination, with elements of the California Unruh Civil Rights Act. It also includes enforcement provisions tailored to the City of Los Angeles.

My proposal is carefully crafted to attack a specific type of discriminatory practice in the business world.

My proposal would prohibit discrimination against women and minorities by any clubs

- That have over 400 members;
- Provide regular meal service; and
- Receive payment directly or indirectly from or on behalf of non-members for the furtherance of business.

The New York City law, which includes these 3 criteria has been upheld by the state's highest court.

I am also recommending that we include specific penalty provisions similar to those found in the California Unruh Civil Rights Act which provides up to triple damages, a fine of not less than \$250 and punitive damages as well as court costs and attorney's fees. Both the City Attorney and a private party could file suit to enforce this plan.

Among those here today are people who have been fighting against the discriminatory practices of these clubs for a long time. We also have representatives from business, organized labor, the legal professions and organizations which play leading roles in the great cultural communities of our City. I believe I speak for all of these fine people in applauding you Councilwoman Picus for carrying this proposal to the City Council.

WRITTEN TESTIMONY SUBMITTED BY
KATHERINE SPILLAR, PRESIDENT OF THE
LOS ANGELES CHAPTER OF THE
NATIONAL ORGANIZATION FOR WOMEN:

These comments are filed on behalf of the Los Angeles Chapter of the National Organization for Women (NOW). I regret not being able to testify to the Committee in person, but prior commitments prevent me from being at City Hall on Wednesday. NOW is the largest feminist organization in California dedicated to assuring equal economic, social and political opportunity for all women. NOW is committed to combatting sex discrimination and removing barriers to women's full participation in all aspects of American society.

The Personnel and Labor Relations Committee is considering a proposed ordinance to eliminate discrimination in Los Angeles exclusive male-only clubs. We applaud your and the Committee's efforts and urge the Committee to take action to bring the ordinance to the City Council for action.

In recent years, wide attention has been given to the impact on women and minorities of exclusion from clubs and organizations that hold themselves out as private, but are in fact centers of business activity. Such exclusion deprives women and minorities of equal economic opportunity, subjects them to personal humiliation and confirms a belief that women and minorities are inappropriate participants in the exercise of power by barring them from informal centers of power.

The business advantage conferred upon members of these clubs and organizations are undeniable, and the loss to business and professional women excluded from its ranks severe. A study sponsored by the American Jewish

Committee revealed that more than half of the corporate executives interviewed believed clubs provided valuable business contacts; over two-thirds reported that such membership adds to one's status in his firm or community.

Women need the access to the career enhancing networks these clubs provide as much as, or more than, men. Despite the gains that women have made in the job market in the last 20 years, they have not attained the same professional status as their white male colleagues. For example, although women now fill nearly one-third of all management positions, most are in jobs which command little authority and relatively low pay. Only two percent of the top executives surveyed in 1985 were women. A recent survey of 1,362 senior executives in positions just under chief executive rank at the nation's largest companies found only 29 women.

These clubs often argue that they are not commercial establishments. In fact, most men-only clubs serve to promote business activity of every conceivable kind. For example, the President of the Bar Association of San Francisco recently conceded that important legal business, both commercial and professional, is transacted at these clubs, stating: "The exclusion of women and minorities operates as an impediment to their full participation in the legal profession." ("Male" Clubs: Bar Leaders are Members, The Recorder, July 22, 1986.)

Society also suffers when women and minorities are excluded from the opportunities presented by membership in business-oriented clubs and organizations. Not only does the exclusion of women and minorities from discriminatory clubs demean an enlightened society by its implicit denigration of their worth and abilities, but it also tangibly injures the commercial and non-commercial

foundation of our nation by depriving us of their full contribution.

The recent Supreme Court decision in *Rotary Club of Duarte vs. Board of Directors* sent a strong message that the state has a compelling interest in eliminating sex discrimination and that infringement on club members' right of expressive association is justified. In addition, the California Franchise Tax Board has recently adopted regulations to prohibit members of discriminatory clubs from deducting business expenses at these clubs from their state taxes. San Francisco is considering apartheid-like sanctions against businesses that reimburse their employees' expenses at discriminatory clubs. The time to act is now. Members of these discriminatory clubs cannot have it both ways: they cannot claim to be private when their members are subsidized by their employers or the taxpayers of California.

Los Angeles NOW stands ready to aid your efforts in any way we can, and to provide any additional information you may need. Please keep us informed of your progress in this matter.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On January 13, 1988, I served the within Amici Curiae Brief in re: "New York State Club Association, Inc. vs. The City of New York" in the United States Supreme Court, October Term 1987, No. 86-1836;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Alan Mansfield	Peter L. Zimroth
Counsel of Record	Counsel of Record
Angelo T. Cometa	Faye Leoussis
Louis J. Lefkowitz	Corporate Counsel for
Debra A. Roth	the City of New York
Phillips, Nizer, Benjamin,	100 Church Street
Krim & Ballon	New York, New York 10007
40 West 57th Street	(212) 656-4338
New York, New York 10019	Attorney for Appellees
(212) 977-9700	
Attorneys for Appellant	

All Parties required to be Served have been Served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on January 13, 1988, at Los Angeles, California


CE CE MEDINA

AMICUS CURIAE

BRIEF

No. 86-1836

Supreme Court, U.S.
FILED

JAN 13 1988

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NEW YORK STATE CLUB ASSOCIATION, INC.,

Appellant,

vs.

CITY OF NEW YORK, THE MAYOR OF THE CITY
OF NEW YORK, THE CITY HUMAN RIGHTS
COMMISSION and THE MEMBERS OF
THE CITY HUMAN RIGHTS COMMISSION,

Appellees.

On Appeal from the Court of Appeals
of the State of New York

BRIEF AMICUS CURIAE OF THE CITY OF CHICAGO IN SUPPORT OF APPELLEES

JUDSON H. MINER,*

Corporation Counsel
of the City of Chicago,

RUTH M. MOSCOVITCH,

Chief Assistant Corporation Counsel,

AMY LOUISE BECKETT,

MARY L. MIKVA,

Assistant Corporation Counsel,

610 City Hall,

Chicago, Illinois 60602,

(312) 744-9687,

*Attorneys for Amicus,
City of Chicago*

January 13, 1988

* Counsel of Record

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No. 86-1836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NEW YORK STATE CLUB ASSOCIATION, INC.,
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vs.

CITY OF NEW YORK, THE MAYOR OF THE CITY
OF NEW YORK, THE CITY HUMAN RIGHTS
COMMISSION and THE MEMBERS OF
THE CITY HUMAN RIGHTS COMMISSION,
Appellees.

On Appeal from the Court of Appeals
of the State of New York

BRIEF AMICUS CURIAE OF THE
CITY OF CHICAGO IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE

The City of Chicago (Chicago) as *amicus curiae*, files this brief in support of affirmance of the opinion and order of the Court of Appeals of New York, pursuant to Rule 36.4¹ of the Rules of this Court. Chicago has a specific

¹ Under Supreme Court Rule 36.4, a state or political subdivision thereof may file an *amicus* brief in this Court without consent of the parties and without permission of the Court.

interest in the case. Shortly after the New York Court of Appeals opinion was rendered below and just after this Court decided *Board of Directors of Rotary International v. Rotary Club of Duarte*, ___ U.S. ___, 107 S. Ct. 1440 (1987), the Chicago City Council unanimously amended its public accommodations ordinance to include a three-part definition patterned after the definition in New York City Local Law 63 (L.L. 63), at issue here.

ARGUMENT

On June 5, 1987, a proposed ordinance ("the Ordinance") was introduced in the City Council of the City of Chicago which was designed to put a stop to discrimination in so-called "private" clubs in Chicago. The proposal, modeled directly after L.L. 63, amended Chicago's public accommodation ordinance, Chapter 199A of the Municipal Code of Chicago, to bring within its ambit those clubs that had more than four hundred members, that provided regular meal service, and that regularly received payments for dues, fees, accommodations, facilities or services from or on behalf of non-members for the furtherance of trade or business. Those clubs or institutions meeting all three criteria were deemed "public accommodations" within the meaning of Chapter 199A and thus, discrimination in such institutions was prohibited. Violators of the Ordinance were subject to citations and imposition of fines.

The Chicago City Council Committee on Human Rights and Consumer Protection held two days of hearings during which a number of witnesses offered testimony in favor of the Ordinance. Not one witness opposed the Ordinance. Even the Union League Club, a club which

has long had exclusive membership policies, did not oppose the regulation. The Union League Club asked only that the Ordinance be made effective thirty (30) days following its passage by the Chicago City Council to give itself time to go on record reversing its discriminatory barriers before the Ordinance took effect. (Testimony of Mary Taylor, Union League Club of Chicago; Minutes of June 18, 1987 meeting of Human Rights and Consumer Protection Committee, p. 2).

The numerous witnesses testifying in favor of the Ordinance all spoke to the need of Chicago professional women to have access to these clubs on the same basis as their male counterparts since important business is regularly transacted in such clubs in the City of Chicago. There was testimony from professional women as to how being barred from clubs had made it difficult for them to assume leadership roles in the community and testimony that, in order for Chicago to continue to attract and hold talented women, women must have access to such clubs in Chicago, on the same basis as men. (Letter of June 23, 1987 to the Committee from the Midwest Women's Center; letter of June 16, 1987 to the Committee's Chairman from the Women's Business Development Center; testimony of Jean Allard and Sheribel Rothenberg, attorneys, partners in two major Chicago law firms.) All the witnesses who testified agreed that the impact of the proposed Ordinance would be on clubs whose primary aim was furthering the business and professional interests of their members. No witness offered any testimony suggesting that any person's associational freedom would be impinged by the Ordinance or by use of the three proposed criteria.

After hearing all the testimony, the City Council of the City of Chicago unanimously adopted the proposed Ordinance. The City Council's concern that discrimination in

such clubs was a current problem that needed addressing is perhaps best expressed in the words of the City Council which incorporated the following findings into the amended Ordinance:

WHEREAS, The City of Chicago has a compelling interest in providing all persons, regardless of race, creed, color, national origin or sex, an equal opportunity to participate in the business and professional life of the City; and

WHEREAS, The City has established its compelling interest in furthering the advancement of women by establishing The Mayor's Commission of Women's Affairs, and by giving preference to Women Owned Business Enterprises (W.B.E.'s) wherever possible, and

WHEREAS, Women and minority persons unfortunately have not yet attained equal opportunity in business and the professions because, in part, of the discriminatory practices of certain membership organizations where business decisions are often shaped, and where personal contacts, valuable for business purposes, employment and professional advancement are formed; and

WHEREAS, Full and equal enjoyment of public accommodations, advantages, facilities, and privileges, protected by Chapter 199A includes equal access to all facilities provided by membership organizations; and

WHEREAS, It has been recognized that accommodations which meet the three (3) criteria set forth below are not, in fact, distinctly private in their nature;

In light of these findings, Chicago amended Chapter 199A of the Municipal Code to provide as follows:

An institution, club or place of accommodation which has more than four hundred members, provides regular meal service and regularly receives payment for

dues, fees, accommodations, facilities or services from or on behalf of non-members for the furtherance of trade or business shall be considered a place of public accommodation for purposes of this Chapter and shall not discriminate on account of race, creed, color, national origin or sex in determining its membership, or in providing accommodations, facilities and services.

In enacting this Ordinance, Chicago was following the lead established by this Court in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *Board of Directors of Rotary International v. Rotary Club of Duarte*, ____ U.S. ____, 107 S. Ct. 1940 (1987), recognizing that so-called private clubs may nevertheless be public accommodations where illegal discrimination may occur. The City has an interest akin to the state interest which this Court recognized to be compelling in those cases, "in assuring equal access to women extends to the acquisition of leadership skills and business contacts as well as tangible goods and services." *Board of Directors of Rotary International*, 107 S. Ct. at 1948. In addition, the City as a whole benefits directly from ensuring the full participation of all of its citizens in the business and commercial life of the City.

The City of Chicago, like the City of New York, is specially qualified to judge whether a problem of denial of equal access exists among its institutions and to determine how best to address that problem. The City Council viewed the three criteria embodied in L.L. 63, and incorporated in the Chicago Ordinance, as appropriate, specific and narrowly tailored guidelines for identifying those clubs where the problem most acutely exists. The Chicago Ordinance, like L.L. 63, provides fair notice to those organizations covered that they must cease their discriminatory conduct, and gives affected members of the public a new enforcement mechanism for protection against discrimination.

The concerns of the witnesses before the City Council which were addressed in the Ordinance have also been expressed by numerous commentators and legal scholars. As these commentators have noted, the essential purpose of such clubs is to promote business and professional interests, and women are disadvantaged by being excluded from such clubs. See Note, *Sex Discrimination in Private Clubs*, 29 Hastings L.J. 417, 419-20 (1977) (private clubs provide important sources of contact for business persons and are considered by some to be leadership training grounds); Goodwin, *Challenging the Private Club: Sex Discrimination—Plaintiffs Barred at the Door*, 13 S.W.U.L. Rev. 237, 280 n.226 (1982) (club membership confers social status and provides business contacts); Burns, *The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 Harv. C.R.-C.L. L. Rev. 321, 325-329 (1983) (private clubs frequently furnish the settings in which important business and political decisions are made, decisions which affect the entire community).

Burns points out that in Chicago in 1981, the Mayor, the President of the University of Chicago, the city editor of the *Chicago Tribune* and the former President of the Chicago Bar Association, all women, were barred from membership in four of Chicago's top private luncheon clubs. Burns, *supra* at 332 n.32. As of June, 1987, these four women, as well as thousands of other women executives, political leaders, managers and other professionals would still have been barred from two of those same clubs. The Chicago Ordinance, like the New York law, ensures that such discrimination cannot and will not occur.

CONCLUSION

The judgment of the Court of Appeals of New York should be affirmed.

Respectfully submitted,

JUDSON H. MINER, *
Corporation Counsel
of the City of Chicago,
RUTH M. MOSCOVITCH,
Chief Assistant Corporation Counsel,
AMY LOUISE BECKETT,
MARY L. MIKVA,
Assistant Corporation Counsel,
610 City Hall,
Chicago, Illinois 60602,
(312) 744-9687,
Attorneys for Amicus,
City of Chicago

January 13, 1988

* Counsel of Record

APPENDIX

AMENDMENT OF MUNICIPAL CODE CHAPTER 199A CONCERNING NONDISCRIMINATION OF MEMBERSHIP BY VARIOUS ORGANIZATIONS

The following is said Ordinance as passed:

WHEREAS, The City of Chicago has a compelling interest in providing all persons, regardless of race, creed, color, national origin or sex, an equal opportunity to participate in the business and professional life of the City; and

WHEREAS, The City has established its compelling interest in furthering the advancement of women by establishing The Mayor's Commission of Women's Affairs, and by giving preference to Women Owned Business Enterprises (W.B.E.'s) wherever possible, and

WHEREAS, Women and minority persons unfortunately have not yet attained equal opportunity in business and the professions because, in part, of the discriminatory practices of certain membership organizations where business decisions are often shaped, and where personal contacts, valuable for business purposes, employment and professional advancement are formed; and

WHEREAS, Full and equal enjoyment of public accommodations, advantages, facilities, and privileges, protected by Chapter 199A includes equal access to all facilities provided by membership organizations; and

WHEREAS, It has been recognized that accommodations which meet the three (3) criteria set forth below are not, in fact, distinctly private in their nature; now therefore,

Be It Ordained by the City Council of the City of Chicago:

SECTION 1. That Section 1 of Chapter 199A of the Municipal Code of Chicago shall be and hereby is amended by adding in italics thereto the following:

App. 2

An institution, club or place of accommodation which has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, accommodations, facilities or services from or on behalf of non-members for the furtherance of trade or business shall be considered a place of public accommodation for purposes of this Chapter and shall not discriminate on account of race, creed, color, national origin or sex in determining its membership, or in providing accommodations, facilities and services.

SECTION 2. This Ordinance shall be in full force and effect from thirty (30) days after its date of passage and publication; provided, however, that if extensive physical alterations must be made to provide equal access to all advantages, facilities and privileges, such alterations shall be made within one hundred eighty (180) days after the date of passage and publication of this Ordinance.

AMICUS CURIAE

BRIEF

JAN 13 1988

ANIOLO, JR.
CLERK

IN THE
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OCTOBER TERM, 1987

NEW YORK STATE CLUB ASSOCIATION, INC.,

Appellant,

—v.—

THE CITY OF NEW YORK, *et al.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

**BRIEF AMICUS CURIAE OF AMERICAN CIVIL LIBERTIES
UNION FOUNDATION, NEW YORK CIVIL LIBERTIES UNION
AND ACLU FOUNDATION OF SOUTHERN CALIFORNIA IN
SUPPORT OF APPELLEES**

PAUL L. HOFFMAN
ACLU Foundation of
Southern California
633 South Shatto Place
Los Angeles, CA 90005
(213) 487-1720

JUDITH RESNIK
University of Southern
California Law Center
University Park
Los Angeles, CA 90089-0071
(213) 743-7302

BURT NEUBORNE
(Counsel of Record)
40 Washington Square South
New York, New York 10012
(212) 998-6172

JOHN A. POWELL
STEVEN R. SHAPIRO
ISABELLE KATZ PINZLER
American Civil Liberties
Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

ARTHUR N. EISENBERG
New York Civil Liberties
Union
132 West 43 Street
New York, New York 10036
(212) 382-0557

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QUESTIONS PRESENTED

1. Does appellant, an association of private clubs, enjoy representative standing under Hunt v. Washington Apple Advertising Commission, 432 U.S. 333 (1977) and International Union, UAW v. Brock, 477 U.S. 274 (1986), to challenge the facial constitutionality of New York City's ordinance forbidding discrimination by large eating clubs that regularly derive income in connection with the trade or business activities of non-members?

2. Is New York City's attempt to ban discrimination against women and minorities by clubs that have more than 400 members, regularly serve meals, and regularly derive income from non-members for the furtherance of trade or business, substantially overbroad within the meaning of Broadrick

v. Oklahoma, 413 U.S. 601 (1973) and New York v. Ferber, 458 U.S. 747 (1982)?

3. Is New York City's attempt to ban discrimination by large eating clubs that regularly derive income from non-members for trade or business purposes rendered facially unconstitutional because the City has established an exemption for religious and benevolent groups in the absence of any testimony that such groups are likely to affect equal access to the successful pursuit of a business or professional career?

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INTEREST OF AMICI^{1/}

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members, dedicated to the protection of the fundamental rights of the people of the United States. The New York Civil Liberties Union is the New York State affiliate of the ACLU. The ACLU Foundation of Southern California, which represented plaintiffs in Rotary Int'l v. Rotary Club of Duarte, ___ U.S. ___, 107 S.Ct. 1940 (1987), is the Southern California affiliate of the ACLU.

This case involves an alleged collision between society's compelling

^{1/} The parties have consented to the filing of this brief. Pursuant to Rule 36.2 of the Rules of this Court, letters of consent are being filed with the Clerk of the Court.

interest in eradicating racism and sexism from our economic and social life and the freedom to associate protected by the First and Fourteenth Amendments to the Constitution. The ACLU has been in the forefront in the defense of associational freedom. Amici believe, however, that no valid associational claim exists in this case. When, as here, a legislature finds that the exclusion of women and members of racial minorities from membership in large clubs that cannot credibly be characterized as intimate associations deprives women and racial minorities of equal access to economic and professional advancement, amici believe that a legislative ban on the invidious discrimination is clearly valid.

STATEMENT OF THE CASE

Concerned that the discriminatory membership policies of large eating clubs were adversely affecting the ability of women and minorities to compete on equal terms in New York City's rigorous economic climate, the New York City Council conducted an investigation into the relationship between equal economic opportunity and the discriminatory membership policies of such clubs.^{2/} After hearings, the Council found that a category of large clubs exists in New York City that render significant assistance to the business and professional careers of club members by affording them an attractive and convenient environment within which to hold

^{2/} See generally, Record of Proceedings before the New York City Council, Committee on General Welfare, December 22, 1983, September 10, 1984.

business discussions, often over meals, with non-members. (Joint Appendix at 14-15) (hereinafter "J.A.____"). The Council further found that, because of the recognized capacity of club membership to enhance business ties, employers often defrayed the dues and expenses of membership in such clubs. (J.A.15). Moreover, the Council found that payments to such clubs by members and employers alike were often deducted as business expenses from the payer's income taxes because of the use of the club as a business asset. The Council also found that such clubs regularly derived income from non-members eager to conduct their business meetings in a congenial and prestigious atmosphere.

At the same time, the Council recognized the social and constitutional

value of private organizations. (J.A.15). The Council sought, therefore, to distinguish between clubs whose small size and intimate nature render them candidates for substantial constitutional protection (and also diminish the likelihood that they will be used to promote the business opportunities of non-members), and clubs whose size and financial nexus with the trade or business activities of non-members place them beyond the ambit of any serious constitutional claim to freedom of intimate association.

The Council concluded that large clubs with more than four hundred members, that both regularly serve meals and regularly derive income in connection with the trade or business activities of non-members: (1) exert a significant impact upon access to a successful business or professional career;

and (2) do not function as intimate political, religious or social associations entitled to substantive constitutional protection. Accordingly, the Council outlawed discrimination against women or minorities in such clubs in order to foster equality of economic and professional opportunity. (J.A.14-15). The Council's hearings did not produce any testimony that clubs organized as religious or benevolent organizations are likely to impact significantly on equality of economic opportunity in New York City. (J.A.15). Consequently, the Council exempted such clubs from the ordinance's per se application. (J.A.14-15).

This litigation was commenced by the New York State Club Association (NYSCA) upon passage of the ordinance and before the ordinance could be applied against any

club. Accordingly, no administrative record exists detailing the membership policies or mode of operation of any club subject to its stricture. (J.A.9-13).

NYSCA is a statewide organization of approximately 125 private clubs, some of which are apparently located in New York City. Throughout the litigation, appellant has adamantly refused to permit the development of a factual record, declining even to identify any of the private clubs on behalf of which it purports to act. (J.A.47). Instead, NYSCA invited the New York courts to speculate about possible application of New York City's ordinance to hypothetical private clubs and, on the basis of such speculation, to strike the ordinance down as unconstitutional on its face.

The New York Court of Appeals accepted appellant's invitation to engage in such speculative facial review but upheld the ordinance under Roberts v. United States Jaycees, 468 U.S. 609 (1984). See New York State Club Ass'n v. City of New York, 69 N.Y.2d 211, 513 N.Y.S.2d 347 (1987). Without any facts in the record, appellant now asks this Court to reverse the decision below and to invalidate the ordinance on its face because it may someday be applied unconstitutionally to an unidentified member of appellant's organization.

SUMMARY OF ARGUMENT

Although NYSCA has couched its challenge in "irrebuttable presumption" terms, the real gravamen of its complaint is that New York City's ordinance is unconstitutionally overbroad because,

according to appellant, it purports to regulate both constitutionally protected and unprotected associational behavior.

Amici believe that New York City's compelling interest in fostering equality of economic and professional opportunity provides ample power to ban racial and sexual discrimination from those large clubs whose activities bear a close financial nexus with the trade or business activities of non-members. A large club that serves meals regularly and elects to receive income regularly in connection with the trade or business activities of non-members, forfeits any serious claim to a right of intimate association protected by the First and Fourteenth Amendments. Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945) (labor union not entitled to First

Amendment exemption from ban on racial discrimination in membership).

Even if one imagines a potential application of New York City's ordinance to an unidentified private club that despite its size and business-laden operation qualifies for constitutional protection, the ordinance remains constitutional on its face since its concededly valid applications dwarf the potential for unconstitutional misapplication. Measured by the substantial overbreadth test enunciated by the Court in Broadrick v. Oklahoma, 413 U.S. 601 (1973), and New York v. Ferber, 458 U.S. 747 (1982), and by the substantive law governing freedom of intimate association set forth in Roberts v. United States Jaycees, 468 U.S. 609 (1984), and Rotary Int'l v. Rotary Club of Duarte, ___ U.S. ___, 107 S.Ct. 1940

(1987), NYSCA's facial overbreadth challenge must fail because the ordinance's capacity for unconstitutional application, assuming it exists at all, is not real and substantial when viewed in the context of its plainly legitimate sweep.

Moreover, it is doubtful whether NYSCA, a statewide association of private clubs, is empowered to assert a facial overbreadth claim on behalf of its member-clubs in the absence of a factual showing that at least one member-club both falls within the ordinance and is capable of asserting a colorable claim of constitutionally protected intimate association. NYSCA's assiduous refusal to permit the development of a factual record below strongly suggests that its member-clubs would find it virtually impossible to contend plausibly that they are intimate

groups with a credible claim to constitutional protection. In the absence of such a showing, the Court ought not to permit an association of clubs to raise phantom claims on behalf of non-existent member-clubs to frustrate an anti-discrimination ordinance.

This appeal is a classic example of a case in which representative standing is inappropriate because both "the claim asserted [and] the relief requested require the participation of individual members in the lawsuit" in order to assure the "individualized proof" critical to appellant's claim of constitutional privilege. Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 343-44 (1977).

Finally, NYSCA's attempt to challenge the facial validity of New York's anti-

discrimination ordinance because it utilizes a different procedure to regulate clubs organized as religious or benevolent corporations fails for two reasons. First, NYSCA lacks capacity to assert an underinclusiveness challenge on behalf of its constituent members in the absence of a showing that similarly-situated religious or benevolent clubs, in fact, exist. Second, the exemption of religious and benevolent clubs from per se coverage represents a legitimate governmental effort to limit regulation of clubs to clearly permissible settings.

Specifically, the exemption of religious clubs from the per se impact of antidiscrimination legislation recognizes the independent constitutional protection available to them under the Free Exercise Clause. E.g., Hobbie v. Unemployment

Appeals Comm'n of Fla., 480 U.S. ___, 107 S.Ct. 1046 (1987); Corporation of the Presiding Bishop v. Amos, ___ U.S. ___, 107 S.Ct. 2862 (1987). The exemption of benevolent corporations from per se application of New York City's ordinance reflects the absence of testimony before the City Council that such clubs play a significant role in career advancement in New York City.

If, in the future, a religious or benevolent club meeting the ordinance's tri-partite criteria is found to affect the career aspirations of excluded persons and is, nevertheless, exempted by the Human Rights Commission from the prohibition on discrimination, there will be time enough for a lower court to determine whether such an exemption is constitutional and, if not, whether the appropriate remedy is best

achieved through statutory interpretation, expansion of coverage, or facial invalidation.

ARGUMENT

- I. APPELLANT MAY NOT ASSERT REPRESENTATIONAL STANDING TO CHALLENGE THE FACIAL CONSTITUTIONALITY OF NEW YORK CITY'S ORDINANCE IN THE ABSENCE OF A FACTUAL SHOWING THAT THE ORDINANCE'S APPLICATION TO ONE OR MORE OF ITS CONSTITUENT CLUBS WOULD POSE A COLORABLE CONSTITUTIONAL QUESTION

NYSCA, an association of private clubs, claims representational standing^{1/} to assert the constitutional rights of unidentified member-clubs whose discriminatory membership policies might be protected by the First Amendment.

NYSCA's member-clubs may well possess individual standing to challenge the

^{1/} NYSCA does not attempt to allege any injury to itself.

application of New York City's ordinance to them, and NYSCA may well possess representative standing to assert claims on behalf of any member-clubs whose characteristics arguably render the ordinance's application to them constitutionally problematic.^{4/} However, this Court has never permitted a purely representative organizational-plaintiff to raise a facial challenge on behalf of hypothetical "members" whose very existence is doubtful because plaintiff has adamantly refused to disclose any information about

^{4/} The capacity of an association to raise the rights of its members has been discussed by this Court in a series of cases. E.g., International Union, UAW v. Brock, 477 U.S. 274 (1986); Hunt v. Washington Apple Advertising Commission, 432 U.S. 333 (1977); Simon v. Eastern Kentucky Welfare Organization, 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975); National Motor Freight Ass'n v. United States, 372 U.S. 246 (1963); and NAACP v. Alabama, 357 U.S. 449 (1958).

them.^{5/} Whenever this Court has relaxed the usual rule in constitutional cases requiring a plaintiff to rely upon his or her own rights, this Court has done so to protect the rights of an identifiable category of existing third-persons whose relevant factual characteristics were known to the Court.^{6/}

In United States v. Raines, 362 U.S. 17 (1960), Justice Brennan announced the

^{5/} Amici do not suggest that the identities of potential challengers must be revealed; rather that a factual description of the challenger's characteristics must be provided. Such a requirement serves two purposes. First, it provides an assurance that a challenger, in fact, exists. Second, it provides this Court with a minimal factual nexus to which a decision can be linked.

^{6/} For the Court's contrary practice during the nineteenth century, see e.g., Montana Co. v. St. Louis Mining & Milling Co., 152 U.S. 160, 169-70 (1894); United States v. Reese, 92 U.S. 214 (1875).

usual rule

that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.

362 U.S. at 21. Measured by the Raines standard, NYSCA's attempt to invoke the rights of hypothetical, potentially non-existent member-clubs, would be improper. This Court has recognized, however, that rigid application of the Raines test could jeopardize the ability of vulnerable persons to enjoy effective protection of their constitutional rights. Accordingly, the Court has permitted litigants to raise the rights of identifiable third-parties in those settings where it would otherwise be difficult to assure the effective

protection of the third-party's constitutional rights.^{2/}

For example, in Barrows v. Jackson, 346 U.S. 249 (1953), the Court permitted a litigant bound by a racially restrictive covenant to assert the rights of prospective minority purchasers in order to assure that the prospective purchasers received a day in court. The Court has also recognized the standing of organizations, in appropriate circumstances, to assert the rights of their constituent members. Thus, in NAACP v. Alabama, 357 U.S. 449 (1958), the Court permitted an association to assert the right of its members to political anonymity because a requirement that individual

^{2/} See generally Note, Standing to Assert Constitutional Jus Tertii, 88 Harv.L.Rev. 423 (1974).

members sue on their own behalf would have destroyed the very right at issue. Most recently, in International Union, UAW v. Brock, 477 U.S. 274 (1986), the Court permitted a union to assert the rights of its members in challenging restrictive rules governing eligibility for an unemployment compensation program because the union was able to present the claims of its members more effectively and with greater resources than individual members acting alone.

In each of the settings in which the Court has permitted third-party standing, the Court was confronted with real-world third-persons whose rights were jeopardized by the application of the challenged rule, whose factual characteristics were known to the Court, and who could not be counted upon to protect their own rights

effectively. That is simply not the case here. NYSCA does not seek representational standing in order to permit a group of member-clubs to secure a day in court, as in Barrows or NAACP v. Alabama; or to achieve a more effective presentation of its members' claims, as in International Union v. Brock. Instead NYSCA seeks standing before this Court to assure that its member-clubs will never be obliged to defend their discriminatory policies in any court.

By pyramiding organizational standing on top of facial overbreadth review, NYSCA asks this Court to strike down on its face a carefully calibrated attempt by New York City to balance concern for equal economic and professional opportunity with respect for social autonomy -- all without any showing that a real-life member-club exists

or is likely to exist that both falls within New York City's ordinance and is sufficiently intimate to raise a colorable claim to First Amendment protection. As a matter of prudential judicial administration,^{8/} amici urge the Court to decline that invitation.

This Court has explicitly noted that organizational standing should be denied in those settings where "individualized proof" is central to the merits of the constitutional claim. Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 343-44 (1977); Warth v. Seldin, 422 U.S.

^{8/} Amici believe that NYSCA satisfies Article III constraints, since its constituent clubs will suffer an injury-in-fact if New York City's ordinance is applied to them. Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982). The prudential question is whether NYSCA should be permitted to launch a facial challenge on behalf of a phantom member-club without a showing that such a club, in fact, exists.

490, 515-16 (1975). In International Union, UAW v. Brock, 477 U.S. 274 (1986), the legal issue before the Court did not require an investigation into the factual characteristics of the union members on whose behalf the claim was made. Here, by contrast, the outcome of NYSCA's derivative claim to intimate association is concededly fact-dependent, requiring careful scrutiny of the operation of any club asserting it.

Unlike International Union, UAW v. Brock, the very essence of the right at issue in this case requires "individualized proof." By their very nature, large clubs catering to both members and non-members are not likely to foster the sort of personal intimacy that is essential to constitutional protection. If, however, an attempt is made to assert a constitutional exemption on behalf of such a club, it

should be asserted by the club itself on a full factual record.

Absent a proper party, this case should be dismissed. On the record as it now stands, there is simply no reason to interfere with the good faith effort of the New York City Council to implement the constitutional principles recently articulated by this Court in Rotary Club and Roberts.

II. NEW YORK CITY'S ORDINANCE IS NOT FACIALLY OVERBROAD BECAUSE IT IS NOT SUSCEPTIBLE TO UNCONSTITUTIONAL APPLICATION IN A SUBSTANTIAL NUMBER OF SETTINGS

A. Appellant's Challenge, Though Phrased In Terms Of Irrebuttable Presumption, Is a Classic Claim Of Facial Overbreadth

NYSCA argues that New York City's ordinance, which forbids discrimination by large private clubs meeting three objective

criteria -- membership of more than 400 persons, regular meal service, and regular receipt of income in connection with the trade and business activities of non-members -- imposes an unconstitutional "irrebuttable presumption" upon certain unnamed clubs, precluding them from establishing that they are intimate associations entitled to constitutional protection.

Taken literally, NYSCA's argument significantly overstates the legal effect of New York City's ordinance. Nothing in the ordinance precludes (nor could it preclude) a private club falling within its coverage from seeking judicial review to interpose a First Amendment defense based upon the allegedly intimate nature of the organization. Whether a club falling within the ordinance's three-pronged test

could succeed in such a showing is of course another matter. The real gravamen of NYSCA's claim is not that private clubs will be denied an opportunity to challenge the constitutionality of the ordinance as applied, but that the statutory classification established by the ordinance sweeps too broadly, bringing within its coverage clubs that should not be subject to anti-discrimination rules.

NYSCA's insistence on casting its challenge in irrebuttable presumption terms is based on a misunderstanding of the irrebuttable presumption doctrine. Under the irrebuttable presumption doctrine, the legislature may not assume that fact B follows from fact A in each and every case. For example, in Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), this Court struck down a legislative

presumption that any woman who was five months pregnant was unfit to teach. Nothing in the irrebuttable presumption doctrine prohibits a legislature from creating statutory classifications that are otherwise permissible based on factual criteria. This case fits into the latter category.

NYSCA insists upon treating the ordinance's three-part test as a set of evidentiary guidelines tending to prove that a club is, or is not, "distinctly private" as a matter of fact. The Council was not, however, using "distinctly private" as a factual description, but as a legal concept. The three criteria are not simply evidentiary guideposts to a factual conclusion, but are themselves the legal criteria determining when a club falls within the ordinance. The issue,

therefore, is whether the statutory criteria are constitutionally valid.

It is true that the Court has on occasion couched in irrebuttable presumption terms a decision that the Due Process Clause requires individualized fact-finding in the administration of certain government programs.^{2/} However, amici know of no setting in which the Court has entertained a facial irrebuttable presumption challenge to the lack of individualized fact-finding. Where, as here, a challenge is to the facial validity of a statutory classification, the Court's focus should be on the substantive validity of the classification.

^{2/} See Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972). But see Weinberger v. Salfi, 422 U.S. 749 (1975).

Phrasing NYSCA's challenge in irrebuttable presumption terms adds nothing to the analysis and, indeed, injects a confusing strain of procedural due process jurisprudence into a question that should be decided on substantive First Amendment and Equal Protection grounds.^{10/}

B. New York City's Ordinance Is Not Facially Overbroad Because Its Capacity For Unconstitutional Application, If It Exists At All, Is Minuscule In Comparison To The Scope Of Its Concededly Valid Applications

Where the existence of a statute poses a threat to the enjoyment of First Amendment rights, First Amendment overbreadth doctrine permits the party before the Court to act as a surrogate to

^{10/} See generally, Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv.L.Rev. 1534 (1974).

preserve the rights of absent third-parties, whether or not his or her own conduct is constitutionally protected. e.g., Houston v. Hill, ___ U.S. ___, 107 S.Ct. 2502 (1987); Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, ___ U.S. ___, 107 S.Ct. 2568 (1987); Broadrick v. Oklahoma, 413 U.S. 601 (1973). This Court has stressed, however, that it will not strike down a statute on facial overbreadth grounds unless the overbreadth is "substantial." New York v. Ferber, 458 U.S. 747, 769 (1982).

In this case, NYSCA's assertion of "substantial overbreadth" rests on an assumption that the First Amendment grants broad protection to so-called "exclusive" clubs -- regardless of a club's size, its provision of regular meal service to non-

members, its regular receipt of income in connection with the trade and business activities of non-members, and its impact on the economic and professional opportunities of members and non-members. NYSCA has, however, dramatically overstated the scope of constitutional protection available to such clubs.

While a constitutional right of intimate personal association does exist, it does not extend to large membership organizations that regularly serve meals to both members and non-members and that regularly derive income in connection with the trade or business activities of non-members. Such large, business-laden eating clubs do not exhibit the attributes of intimacy and personal self-definition that mark the outer limits of constitutionally protected free association in a social

context. See Karst, The Freedom of Intimate Association, 89 Yale L.J. 624 (1980).

The asserted tension between associational freedom and equality is no stranger to this Court. Every democratic judgment condemning invidious discrimination, whether in the area of employment,^{11/} housing,^{12/} or education,^{13/}

^{11/} E.g., Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945) (exclusion of racial minorities from labor unions); Hishon v. King & Spalding, 467 U.S. 69 (1984) (exclusion of women from partnership status at law firm).

^{12/} E.g., Hurd v. Hodge, 334 U.S. 24 (1948) (unenforceability of racially restrictive covenants); Jones v. Alfred H. Mayer, 392 U.S. 409 (1968); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (racial discrimination in sale or rental of housing).

^{13/} E.g., Runyon v. McCrary, 427 U.S. 160 (1976); Norwood v. Harrison, 413 U.S. 455 (1973); Bob Jones University v. U.S., 461 U.S. 574 (1983) (racial discrimination in admission to private schools).

or access to public accommodations,^{14/} has been challenged by individuals asserting a constitutionally protected freedom to discriminate couched as a right to associate -- and to refrain from associating -- with persons of their choice.

If accepted by this Court, such an unbounded freedom to dis-associate would cripple the guarantees of equality contained in the Constitution and in our civil rights statutes; every ban on discrimination would be checkmated by an

^{14/} E.g., Rotary Int'l v. Rotary Club of Duarte, ___ U.S. ___, 107 S.Ct. 1940 (1987) (exclusion of women from Rotary Clubs); Roberts v. United States Jaycees, 468 U.S. 609 (1984) (exclusion of women from Jaycees); Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964) (exclusion of blacks from restaurants and hotels); Daniel v. Paul, 395 U.S. 298 (1969) (exclusion of blacks from recreational facility); Tillman v. Wheaton-Haven Recreational Ass'n, 410 U.S. 431 (1973) (exclusion of blacks from amusement park).

assertion of individual autonomy phrased as a substantive due process claim to associational freedom. Not surprisingly, therefore, the Court has uniformly rejected associational challenges to democratic judgments condemning discrimination, unless the challengers were able to demonstrate that the association was linked to the advancement of an independent, substantively protected constitutional value. E.g., Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945); Runyon v. McCrary, 427 U.S. 160 (1976); Roberts v. Jaycees, 468 U.S. 609 (1984); Rotary Int'l v. Rotary Club of Duarte, ___ U.S. ___, 107 S.Ct. 1940 (1987).

A claim of associational right not tied to a substantive constitutional value is, in essence, an assertion of inherent freedom from the regulatory reach of the

law. The principal constitutional underpinning of such a general claim to associational freedom is the substantive due process clause. Moore v. East Cleveland, 431 U.S. 494 (1977). See Karst, Freedom of Intimate Association, 89 Yale L.J. 674 (1980). While such a substantive due process claim should be respected when personal bonds of transcendent significance are at stake -- such as marriage, family and intimate social relationships -- members of large clubs that regularly serve meals to non-members and regularly derive income from the trade or business activities of non-members can hardly claim bonds of such intimacy.

By contrast, this Court has recognized that the freedom to associate is critical to the enjoyment of substantive rights protected by the First Amendment.

Accordingly, the Court has recognized that freedom to associate for political ends is a necessary attribute of the substantive free speech values protected by the First Amendment. E.g., NAACP v. Alabama, 357 U.S. 449 (1958); NAACP v. Button, 371 U.S. 415 (1963); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Tashjian v. Republican Party of Connecticut, ___ U.S. ___, 107 S.Ct. 544 (1986). Similarly, the Court has recognized a constitutionally protected right to associate for the advancement of religious ends. E.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972); Widmar v. Vincent, 454 U.S. 263 (1981). In addition, the Court has held that the respect for individual dignity inherent in the First, Fourth, Fifth, Ninth and Fourteenth Amendments compels the recognition of a

constitutionally based freedom of intimate personal association, linked to the preservation of family life and an individual's attempt at personal self-definition. E.g., Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to control child's education); Loving v. Virginia, 388 U.S. 1 (1967) (right to marry); Zablocki v. Redhail, 434 U.S. 374 (1978) (same); Moore v. East Cleveland, 431 U.S. 494 (1977) (right of extended family to live together); Stanley v. Illinois, 405 U.S. 645 (1972) (parental rights); Santosky v. Kramer, 455 U.S. 745 (1982) (same); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to use contraceptives); Carey v. Population Services Int'l, 431 U.S. 678 (1978) (same); Bigelow v. Virginia, 421 U.S. 809 (1975) (right to

associate for dissemination of abortion information). But see, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

The right of personal association, however, is not simply a matter of self-declaration; it must be measured against constitutional standards. Thus, twice within the past three years, this Court has rejected a claim of immunity from anti-discrimination laws asserted by associations lacking key attributes of intimacy. Rotary Int'l v. Rotary Club of Duarte, ___ U.S. ___, 107 S.Ct. 1940 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984). In Rotary Club, the Court described the nature of the intimate social bond worthy of constitutional protection as,

[a] deep attachment[] and commitment[] to the necessarily few other individuals with whom we share not only a special

community of thoughts, experiences and beliefs, but also distinctly personal aspects of one's life.

107 S.Ct. at 1946 (emphasis added), quoting Roberts, 468 U.S. at 619-20.

While amici believe that the protected bond should transcend current case law confining it to family and intimate heterosexual relationships,^{15/} and should protect the bonds of intimate social contact critical to the definition of the human personality, the bond between a private club-member and his prospective client over cocktails and dinner hardly qualifies as an intimate human relationship worthy of First, Fifth, Ninth and Fourteenth Amendment protection. There is no constitutional right to a business

^{15/} Cf. Bowers v. Hardwick, ___ U.S. ___, 106 St.Ct. 2841 (1986).

meal in the company of hundreds of other diners and club members chosen on the basis of discriminatory criteria that deprive women and minorities of equal access to economic opportunity.

Over forty years ago, blue collar workers argued in Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945), that their labor union was an association of such personal and political significance that it should be immune under the First Amendment from the reach of the nation's anti-discrimination laws. The workers argued that a labor union was not simply an economic entity, but the focal point of a host of social and political relationships that deserved First Amendment associational protection. This Court quite correctly rejected the First Amendment argument in Corsi, ruling that the imperative of equal

economic opportunity outweighed the union member's desire to refrain from associating with racial minorities.

The same principle governs this appeal. If a blue collar worker's claim to associational freedom within his union cannot trump an anti-discrimination statute, this Court must likewise reject a white-collar employer's claimed right to discriminate within a club in which he routinely cultivates advantageous business and professional relationships.

It is, of course, possible to imagine a private club capable of asserting a credible claim to First and Fourteenth Amendment protection. For example, a club whose focus is political or religious, and whose tenets would be compromised by the admission of a member of a disfavored racial or ethnic group or a member of the

opposite sex, would be entitled to First Amendment protection. E.g., Tashjian v. Republican Party of Connecticut, ___ U.S. ___, 107 S.Ct. 544 (1986); Widmar v. Vincent, 454 U.S. 263 (1981). New York City, however, has attempted to minimize the potential for such an arguably unconstitutional application of the ordinance by presumptively exempting clubs organized as religious and benevolent corporations and by drafting a three-pronged set of criteria for inclusion under the ordinance that excludes any bona fide political organization.

It is even possible to imagine a purely social club with bonds of intimacy so intense as to mount a credible claim to First Amendment protection, although it is hard to imagine such a club falling within the ordinance's three-part test. But on

the present record it is sufficient to note that NYSCA has not yet identified any such club.

To paraphrase the Court's holdings in Broadrick and Ferber, the ordinance's field of constitutional application dwarfs its potential for unconstitutional application, at least so far as this record reveals. Indeed, given the state of the law governing intimate association, it is impossible to argue in this evidentiary vacuum that New York City's ordinance will have any unconstitutional impact. At worst, the ordinance is theoretically capable of an aberrational, and highly unlikely, unconstitutional application. Accordingly, NYSCA's facial overbreadth claim must fail. If and when genuine constitutional issues are posed in the context of applying New York City's

ordinance to particular clubs, there will be time enough to consider them on a case by case basis as they actually arise.

Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35, 52 (1966).

III. NEW YORK CITY'S DECISION TO EXEMPT ASSOCIATIONS ORGANIZED AS RELIGIOUS OR BENEVOLENT CORPORATIONS FROM PER SE OPERATION OF THE ORDINANCE DOES NOT RENDER THE ORDINANCE FACIALLY UNDERINCLUSIVE

NYSCA argues that New York City's decision to provide clubs organized as religious or benevolent corporations with an exemption from the statute's ban renders the statute unconstitutionally discriminatory. Clubs represented by NYSCA must cease discriminating if they fall within the ordinance's three-pronged test. Religious or benevolent clubs, if any, falling under the ordinance's criteria may continue to discriminate, however, since

they are presumptively "deemed" to be "distinctly private."

NYSCA's attempt to invalidate the ordinance as facially underinclusive fails on three levels. First, NYSCA has not even alleged -- much less demonstrated -- the existence of religious or benevolent clubs that (1) fall within the ordinance's three part test, (2) discriminate in access to membership, and (3) exercise an impact upon the career opportunities of non-members. In the absence of such a showing, NYSCA's claim of discriminatory treatment is premature and cannot trigger facial review for underinclusiveness. See Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); United Public Workers v. Mitchell, 330 U.S. 75 (1947).

Second, New York City's decision to utilize a different procedural mechanism to

evaluate the claims of religious and benevolent clubs is not unconstitutionally discriminatory. Application of an anti-discrimination ordinance to a religious corporation raises a host of unique issues that justify treating religious corporations differently from secular groups in determining the applicability of the ordinance. Similarly, the absence of any testimony before the City Council that business activity is "prevalent" in benevolent associations (J.A.15), justifies the Council's decision to utilize different procedures in applying an ordinance designed to foster equality of economic opportunity.

Finally, in the event that a religious or benevolent club (1) satisfies the ordinance's three-pronged test, (2) maintains a discriminatory membership

policy, (3) exerts an impact on equal economic opportunity, and (4) is granted an exemption by the Human Rights Commission, there will be ample occasion to consider the constitutionality of the decision to grant an exemption. It is particularly important that such a constitutional challenge be considered initially in a lower court on a full factual record; inevitably, the issues raised will involve questions of state statutory construction and whether the ordinance, if unconstitutional, should be expanded or invalidated in toto.

A. Appellant's Underinclusive-
ness Challenge Is Not Ripe

NYSCA complains that its members are subject to a per se rule requiring them to cease discrimination while similarly situated religious or benevolent

associations will be permitted to continue discriminating. The short answer to NYSCA's claim of discriminatory treatment is that no showing has been made on this record that any "similarly situated" religious or benevolent clubs exist. Neither religious nor local benevolent clubs often exceed 400 members.^{16/} They often do not regularly serve meals. Nor do they regularly derive income from the trade or business activities of non-members. Thus, for all that can be known on the current record, no religious or benevolent club exists that would fall within the

^{16/} An unresolved issue of state law exists concerning the requirement of more than 400 members contained in the ordinance. As applied to a benevolent organization such as the Elks or Moose, it is unclear whether the membership of the entire organization or of the local lodge is the relevant figure. If the local lodge's membership is the relevant figure, a benevolent organization will often fall under 400 members.

ordinance's three criteria. Moreover, even if one were to assume the existence of such a club, there was no testimony before the Council that either religious or benevolent clubs in New York City adversely affect the career opportunities of non-members. Until NYSCA identifies a religious or benevolent club that falls under the ordinance and affects the business careers of non-members, there is no showing that any "similarly situated" club exists that is receiving a so-called discriminatory advantage.

Although this Court has subjected differential treatment of similarly situated persons to exacting scrutiny, especially in a First Amendment context, the Court has always required a showing that the alleged beneficiary of the discrimination actually exists. Thus,

while NYSCA's members possess standing to challenge the ordinance's alleged underinclusiveness, their claim is not ripe for judicial consideration in the absence of a showing that similarly situated entities actually exist that are enjoying discriminatory treatment.^{17/}

B. New York City's Decision To Exempt Religious And Benevolent Clubs From The Per Se Impact Of The Anti-Discrimination Ordinance Does Not Render The Ordinance Facially Underinclusive

1. The Nature of the Exemption

New York City's anti-discrimination ordinance generally exempts "distinctly

^{17/} For example, in Arkansas Writers' Project, Inc. v. Ragland, ___ U.S. ___, 107 S.Ct. 1722 (1987), and Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983), no doubt existed that two categories of speakers were being differentially treated. Given the record in this case, the very existence of a second category is in doubt.

private" clubs. As construed and upheld by the New York Court of Appeals, the phrase "distinctly private" used in the ordinance tracks the area of constitutional privacy alluded to by this Court in Roberts and Rotary Club. New York State Club Ass'n v. City of New York, 69 N.Y.2d 211, 513 N.Y.S.2d 347 (1987). Clubs belonging to NYSCA cannot qualify as "distinctly private" if they have more than 400 members, serve meals regularly, and derive regular income in connection with the trade or business activities of non-members. Clubs organized as religious or benevolent corporations, however, are "deemed" "distinctly private" by the ordinance, even if they fall within the three criteria.

As described below, this differential treatment recognizes the diverse factual and legal issues that arise when an anti-

discrimination ordinance is applied to a religious association or to a neighborhood social club. The ordinance, therefore, satisfies any level of judicial scrutiny.

2. The Exemptions Are Valid Attempts To Deal With The Different Factual And Legal Status Of Religious And Benevolent Groups

(a) Religious Groups

NYSCA's contention that permitting a religious association otherwise covered by the ordinance to retain a presumptive exemption improperly discriminates in favor of the religious group is flatly wrong. The heightened constitutional protection afforded to religious associations surely authorizes -- if it does not require -- differential treatment in considering whether a religious exemption to an anti-discrimination ordinance should be granted. While the Establishment Clause places a

limit on the degree to which the State may favor a religious association, permitting religious groups a Free Exercise-based exemption not generally available to secular groups does not even approach the danger zone. Compare Corporation of the Presiding Bishop v. Amos, ___ U.S. ___, 107 S.Ct. 2862 (1987), and Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. ___, 107 S.Ct. 1046 (1987), with Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985). Suggesting that the Equal Protection Clause requires religious and secular groups to be treated identically in the context of ordinances forbidding discrimination merely restates the Establishment Clause issue and wholly ignores the existence of the Free Exercise Clause. See generally, Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S.

696 (1976); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952). See also Laycock, Towards a General Theory of the Religious Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Colum.L.Rev. 1373, 1389 (1981).

(b) Benevolent Groups

New York's City Council held legislative hearings prior to passage of the challenged ordinance. There was, apparently, no testimony at those hearings that benevolent clubs in New York City exert a significant impact on equality of economic opportunity. (J.A.15).

Conversely, the Council recognized that such neighborhood-based clubs might well possess a greater claim to constitutional protection of intimate social association. Accordingly, as with religious clubs, the

Council exempted benevolent groups from per se coverage of the ordinance's three-part test.

The Council's decision to exempt benevolent groups from per se application of the ordinance is valid both because it recognizes the greater degree of social intimacy that often characterizes neighborhood benevolent clubs and because it recognizes that the per se application of the anti-discrimination ordinance to benevolent clubs is not necessary to the ordinance's avowed purpose of fostering equality of economic opportunity in New York City.

A procedure that singles out such neighborhood clubs and provides them with a means to preserve their claim to "distinctly private" status can hardly be said to discriminate unconstitutionally

against large, business-laden clubs with no serious claim to social intimacy.^{18/}

^{18/} The structure of the ordinance strongly suggests that the religious and benevolent exemption is merely presumptive. The operative provisions of the ordinance consist of three sentences. The first sentence exempts a club which "proves that is in its nature distinctly private." The second sentence provides that a club "shall not be considered in its nature distinctly private" if it has more than 400 members, regularly serves meals, and regularly receives payment from or on behalf of non-members for the furtherance of trade or business. The third sentence provides that for the purposes of "this section," a religious and benevolent club "shall be deemed to be in its nature distinctly private."

NYSCLA insists upon reading the three sentences as conferring an absolute exemption on religious and benevolent clubs. In fact, a more plausible reading recognizes the differences in wording used in each of the three sentences and seeks to give meaning to each sentence. Such a reading would allow the third sentence to satisfy the burden of production established by the first sentence, but to permit the consideration of additional evidence, if relevant. Under such a reading, religious and benevolent clubs would enjoy a presumptive exemption, in the absence of evidence to the contrary. Cf. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

The substantial ambiguity latent in the use of differing language in the three sentences is yet another reason why facial review is inappropriate.
(continued...)

3. If Unconstitutional Distinctions Are Drawn In Favor Of Specific Religious Or Benevolent Clubs In The Future, Redress May Be Granted By The Lower Courts

It is possible -- although quite unlikely -- that specific religious or benevolent clubs will be identified in the future that (1) fall within the ordinance's three-part test, (2) discriminate in membership, and (3) exert an impact upon equal economic opportunity. If, despite such a showing, the Human Rights Commission were to exempt such a club from the ordinance's reach, a genuine Equal Protection issue would be raised. Such a

^{18/} (...continued)

At a minimum, New York courts should be given an opportunity to provide an authoritative construction of the ordinance, if and when this exemption becomes relevant. Cf. Railroad Comm. of Texas v. Pullman Co., 312 U.S. 496 (1941).

narrowly focused Equal Protection challenge, mounted by a would-be club member (or by one of appellant's clubs complaining of unfair treatment), might succeed. E.g., Larson v. Valente, 456 U.S. 228, 246 (1982); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983); Arkansas Writers' Project, Inc. v. Ragland, ___ U.S. ___, 107 S.Ct. 1722 (1987). But see Cornelius v. NAACP Legal Defense & Educational Fund, 473 U.S. 788 (1985).

A lower court confronted with such a challenge would have at least three options. First, the court could construe the ambiguous language of the ordinance to deny the exemption.^{19/} Second, the court

^{19/} See infra at n.18.

could recognize the statutory validity of the exemption, but grant relief extending the statute's scope in order to cure its underinclusiveness. Finally, the court could brand the ordinance unconstitutionally underinclusive and invalidate it in toto. Whether it will ever be necessary for a lower court to confront such a challenge is a matter of speculation. What is clear is that such a narrowly focused Equal Protection case is the proper forum within which to resolve claims about the potential underinclusiveness of New York City's statutory scheme. This case is not yet at that stage.

CONCLUSION

For the above-stated reasons, the appeal should be dismissed for want of a properly presented federal question. In the alternative, the decision below should be affirmed.

Respectfully submitted,

Burt Neuborne
(Counsel of Record)
40 Washington Square
South
New York, NY 10012
(212) 998-6172

John A. Powell
Steven R. Shapiro
Isabelle Katz Pinzler
American Civil Liberties
Union Foundation
132 West 43 Street
New York, NY 10036
(212) 944-9800

Arthur N. Eisenberg
New York Civil
Liberties Union
132 West 43 Street
New York, NY 10036
(212) 382-0557

Paul L. Hoffman
ACLU Foundation of
Southern California
633 South Shatto Place
Los Angeles, CA 90005
(213) 487-1720

Judith Resnik
University of Southern
California Law Center
University Park
Los Angeles, CA 90089-
0071
(213) 743-7302

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AMICUS CURIAE

BRIEF

FOR ARGUMENT

No. 86-1836

(20)

Supreme Court, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NEW YORK STATE CLUB ASSOCIATION, INC.,

Appellant,

—v.—

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF NEW
YORK, THE CITY HUMAN RIGHTS COMMISSION AND THE
MEMBERS OF THE CITY HUMAN RIGHTS COMMISSION,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

**BRIEF OF THE COMMITTEES ON CIVIL RIGHTS
AND SEX AND LAW OF THE ASSOCIATION OF
THE BAR OF THE CITY OF NEW YORK AS AMICUS
CURIAE IN SUPPORT OF APPELLEES,
THE CITY OF NEW YORK, ET AL.**

ROBERT M. KAUFMAN
42 West 44th Street
New York, New York 10036
(212) 382-6600

Counsel of Record for *Amicus Curiae*,
the Committees on Civil Rights
and Sex and Law of the Association of
The Bar of the City of New York

Of Counsel:

JONATHAN LANG
ARTHUR LEONARD
JANE E. BOOTH
EVELYN F. COHN
MARY SUE HENIFIN
PRISCILLA LUNDIN
KAY C. MURRAY

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The Committees on Civil Rights and Sex and Law of The Association of the Bar of the City of New York (the "Association") respectfully submit this brief on behalf of the Association with the consent of counsel to both parties as *amicus curiae* in support of Appellees.

Interest of Amicus

The Association is an organization of about 17,000 lawyers practicing or residing principally in the New York City metropolitan area. Any member of the legal profession may apply for membership in the Association.

The Association is committed to the principle of individual liberty, including the reasonable expectation of privacy and freedom of association. The Association is equally committed to eliminating invidious discrimination in all areas of public life, including organizations and clubs in which professional activities often take place.

From 1870, when the Association was formed, until 1937, women were not admitted to membership. Thus, in light of its own history, the Association is in a unique position to comment on the adverse effects that discriminatory exclusion from membership in an organization may have on professional standing and career advancement.

The Association has gained considerably by admitting women members. Today, many women are actively involved in the Association's committees. In addition, several members of the Association's Executive Committee are women, including its Chair, and women head more than twenty of the Association's standing and special committees.

In 1981, the Association determined that it was untenable to continue to patronize the type of club subject to scrutiny under New York City Local Law 63, the statute at issue in this appeal. Accordingly, on April 8, 1981, the Association's Executive Committee adopted the following resolution:

WHEREAS, although it is the expectation of the Executive Committee that, to the extent practicable, meetings of the Association, its officers, committees and staff be held at the House of the Association, it is often desirable to hold such meetings at law offices, hotels, restaurants, or private clubs; and

WHEREAS, some private clubs do discriminate in their admission of members, and any such discrimination on the basis of sex, race, religion or national origin can be offensive to our members;

NOW THEREFORE, it is hereby resolved to be the policy of the Association that none of its meetings and no meetings of its officers, committees or staff be held at clubs whose admissions policies are known, or are publicly acknowledged, to be discriminatory on the basis of sex, race, religion or national origin.

The Association has also supported other measures to combat the kind of discrimination involved in this case. In 1982, the Association co-sponsored a resolution before the American Bar Association endorsing amendments to Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, which would have included in the definition of a public accommodation any club that derives a substantial portion of its income from business sources. In 1984, the Association introduced an amendment to an ABA resolution supplementing the Commentary to Canon 2 of the Code of Judicial Conduct; under this amendment, a judge's membership in a club with discriminatory policies would have given rise to an appearance of impropriety.

The Association has a strong interest in the affirmance of the decision of the New York Court of Appeals because attorneys in groups whom the legislature has identified as being subject to invidious discrimination¹ are seriously disadvantaged when they cannot participate fully in all aspects of the legal community, including clubs which function as an extension of that community. It is the Association's belief that a reversal of the decision below will have severe negative consequences on the advancement of these groups in the legal profession.

¹ It is an unlawful practice under the New York City Human Rights Law for a public accommodation to discriminate based on race, creed, sex, national origin, and sexual orientation. Admin. Code of the City of New York, Title 8, §§ 8-107(2); 8-108-1 (1986).

Summary of Argument

The questionable First Amendment rights asserted by Appellant, The New York State Club Association (the "Club Association"), on behalf of its members are easily outweighed by the compelling interest of appellee, The City of New York ("the City"), in eliminating invidious discrimination in organizations subject to Local Law 63. Under the well-settled principles established by this Court, First Amendment rights are not absolute, but must be measured against such a compelling interest.

Local Law 63 identifies organizations subject to its anti-discrimination provisions in a constitutionally permissible manner. The statute's threefold test—size, service of meals to non-members, and business support and use—is reasonably calculated to determine objectively whether or not an organization has an expectation of privacy sufficient to engage in discrimination that, as a policy matter, has been declared unlawful in the public arena.

The City's interest here is indeed compelling. The available social data and literature, as well as the experience of the Association, support the conclusion that the systematic exclusion of disadvantaged groups from large, business-oriented clubs undermines their career advancement and professional esteem. The asserted right of the Club Association's members to be with each other and with outsiders in a largely business environment cannot withstand the compelling interest of the City in encouraging a diverse, non-discriminatory business and professional environment for all of its citizens.

ARGUMENT

POINT I

LOCAL LAW 63 UTILIZES CONSTITUTIONALLY PERMISSIBLE CRITERIA FOR DETERMINING WHEN AN ORGANIZATION IS SUBJECT TO ITS ANTIDISCRIMINATION PROVISIONS.

In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) ("Jaycees"), this Court held that the Jaycees' all-male membership policy was not entitled to a First Amendment-based exemption from the Minnesota public accommodations law, based on the large size of the Jaycees chapters, the group's unselective membership policy, and the regular participation of numerous non-members of both sexes "[i]n a substantial portion of activities central to the decision of many members to associate with one another. . . ." *Id.* at 621.

More recently, in *Board of Directors of Rotary International, et al. v. Rotary Club of Duarte*, 107 S.Ct. 1940 (1987) ("Rotary"), this Court determined that the California public accommodations law precluded the parent organization of Rotary clubs from enforcing its all-male policy on a local chapter which had admitted women, in light of the unlimited size of Rotary clubs, Rotary's minimally selective membership policy, and club activities involving the participation of many non-members. *Id.* at 1946.

In deciding *Jaycees* and *Rotary*, this Court made it clear that the characteristics which permitted state regulation of the membership policies of Rotary clubs and the Jaycees are by no means the exclusive determinants of whether an organization may be subject to anti-discrimination legislation. As this Court stated in *Jaycees*:

[There is] a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State. Determining the limits of state authority over an individual's freedom to

enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments. We need not mark the potentially significant points on this terrain with any precision. We note only that factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent. 468 U.S. at 620. (Emphasis added, citation omitted.)

In this case, Local Law 63 sets forth three objective factors as a means of determining when an organization may be subject to the New York City Human Rights Law. An organization must: (1) have over 400² members, (2) serve meals regularly; and (3) regularly accept funds from non-members to further business interests.

These three factors were formulated after testimony before the New York City Council (the "City Council") in hearings about the way business clubs function in the New York metropolitan area. According to the Legislative Declaration regarding the purposes of Local Law 63, the City Council found that:

business activity often occurs at clubs having more than four hundred members which provide regular meal service allowing persons to discuss business. The dues and expenses of such organizations are often paid by their employers, because the employee's activities at the organization help to develop the employer's business. The organizations also rent their facilities through members for use as conference rooms for business meetings attended by non-members. Organizations where such practices occur provide benefits to business entities and persons other than members and thus are not in fact "distinctly private"

² In *Jaycees*, this Court characterized the Minneapolis chapter of the Jaycees, which had 400 members, and the St. Paul chapter, which had 430 members, as "large". 468 U.S. at 609.

in their nature. (Jurisdictional Statement, hereinafter "JS" at 28a.)

It is clear that Local Law 63 provides a constitutionally permissible way to resolve the question of whether an organization is sufficiently public to be subject to anti-discrimination legislation. In enacting Local Law 63, the City Council recognized what the Association has learned from its own experience: "private" clubs are often not all that private—especially when they are large and serve meals to the business community.

The decision of the court below is consistent with *Jaycees* and *Rotary* in other respects. Like the state public accommodations laws in those cases, this statute prohibits invidious discrimination in organizations pervaded by business activity. See *Jaycees*, 468 U.S. at 626; *Rotary*, 107 S.Ct. at 1948. Similarly, Local Law 63 does not require any organization to change its arguably expressive activities or organizational principles; nor is an organization subject to government interference based on its viewpoint. Cf. *Jaycees*, 468 U.S. at 601; *Rotary*, 107 S.Ct. at 1947. Finally, Local Law 63 advances its objectives in the least restrictive means possible. See *Jaycees*, 468 U.S. at 626; *Rotary*, 107 S.Ct. at 1947-48. The Legislative Declaration to Local Law 63 provides in pertinent part:

It is not the Council's purpose to dictate the manner in which certain private clubs conduct their activities or select their members, except insofar as is necessary to ensure that clubs do not automatically exclude persons for consideration for membership or enjoyment of club accommodations and facilities and the advantages and privileged of membership, on account of invidious discrimination. (JS at 28a.)

Under Local Law 63, then, those clubs which function as extensions of their members' homes may continue to practice invidious discrimination. Those clubs which are extensions of their members' businesses may not. It is clear that Local Law

63 provides constitutionally permissible criteria for telling the difference.³

³ Business activities occurring at clubs, which are members of the Club Association, are a matter of common knowledge and are frequently covered in the news media. For example: meetings of the Tax Forum, a group of prominent New York tax lawyers, at the University Club, N.Y.L.J., June 20, 1983, at 1, col. 2; a meeting of the president of American Airlines with stock market analysts at the Union Club, N.Y. Times, March 1, 1984, at D1, col. 3; a promotional appearance by Boris Becker and Martina Navratilova at the University Club to advertise an apparel company, N.Y. Times, August 27, 1985, at B5, col. 1; a luncheon sponsored by Avenue Magazine featuring Donald Trump at the Links Club, Real Estate Weekly, August 18, 1986, at 24, col. 4; reported meetings between the Hotel Association and the Hotel and Restaurant Workers Union at the New York Athletic Club, N.Y. Times, March 3, 1987 at B1, col. 2; a holiday party sponsored by the Mortgage Bankers Association of New York and the Young Mortgage Bankers Association at the Union League Club, open to members of the public at \$50 per person, Real Estate Weekly, November 30, 1987, at 12, col. 4; a law firm dinner for "lawyers only" at the River Club, Manhattan Lawyer, December 15-21 1987, at 31, col. 2. Courts have taken judicial notice of such public notoriety. See *Wright v. Cork Club*, 315 F. Supp. 1143, 1153 (S.D. Tex. 1970).

All of the aforementioned clubs are members of the Club Association and went on record as opposing Local Law 63 before it was enacted. N. Y. Times, December 23, 1983, at B4, col. 6.

The nonmember business income derived by the clubs regulated by Local Law 63 is significant. At the Century Association, whose members have voted to abide by Local Law 63 if it is upheld by the Court, an internal report estimated that giving up this source of income and "going private" would cost the club more than \$150,000 a year. N.Y. Times, August 22, 1987, at 1, col. 3. And when the University Club contemplated eliminating business income from nonmembers in order to continue its all-male policy, the management of the club predicted a substantial loss of business in its banquet department and the possible closing of its overnight rooms. N.Y. Times, March 19, 1987, at B2, col. 5.

POINT II

LOCAL LAW 63 DOES NOT UNCONSTITUTIONALLY INFRINGE THE ASSOCIATIONAL RIGHTS OF ORGANIZATIONS WHICH CONFER SUBSTANTIAL COMMERCIAL BENEFITS.

A. The First Amendment Rights Asserted by Appellant May be Limited by the City's Compelling Interest in Eliminating Discrimination.

Those who attack anti-discrimination legislation of all types often rely upon a spurious claim to an unfettered constitutional right to associate with anyone they please, and therefore to exclude anyone they please.⁴ This case is no exception.

The court below saw through this timeworn approach, and found that the Club Association's asserted First Amendment rights to privacy, free speech, and association on behalf of its members are not unconstitutionally infringed by Local Law 63. 513 N.Y.S.2d at 354-56. Moreover, the court concluded that any incidental intrusion by the statute on protected free speech rights is "[n]o greater than is necessary to fulfill the State's legitimate purpose in extending to [women and minorities] equal opportunity in employment." *Id.* at 356.

This decision flows logically from this Court's holdings in *Jaycees* and *Rotary*. In those cases, too, questionable claims to First Amendment freedoms were outweighed by compelling state interests in eliminating sex discrimination in organizations which had, among their stated purposes, the fostering of leadership skills and business contacts. See *Jaycees*, 468 U.S. at 624; *Rotary*, 107 S. Ct. at 1948. As Justice O'Connor stated in her concurring opinion in *Jaycees*: "[a]n association must choose its market. Once it enters the marketplace of commerce

⁴ For example, Title II (public accommodations) of the Civil Rights Act of 1964 was unsuccessfully challenged on this ground. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). See also *Hishon v. King & Spaulding*, 467 U.S. 69 (1984) (Title VII of the Civil Rights Act of 1964).

in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas." 468 U.S. at 636.

It is well established that invidious discrimination harms both individual and societal interests. See, e.g., *Hishon v. King & Spaulding*, 467 U.S. 69, 82 (1984); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-726 (1982); *Frontiero v. Richardson*, 411 U.S. 677, 684-687 (1973); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964). Accordingly, the definition of a public accommodation has been applied to include a broad range of activity. As this Court observed in *Jaycees*, when upholding Minnesota's definition of a public accommodation:

This expansive definition [of a public accommodation] reflects a recognition of the changing nature of the American economy, and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women.

468 U.S. at 625-26.

Local Law 63 is consistent with these principles. By limiting its scope to organizations which have chosen to enter the commercial marketplace, the statute only regulates organizations in a position to impede the advancement of disadvantaged groups in the business and professional life of the public at large. Anti-discrimination laws are traditionally—and constitutionally—directed at preventing such organizations from denying the benefits available to members of the majority to groups traditionally subject to invidious discrimination.

B. An Organization That is Not "Distinctly Private" as Defined by Local Law 63 is Engaged in Discrimination Harmful to the Public Interest.

The City Council enacted Local Law 63 to give New Yorkers "[a] fair and equal opportunity to participate in the business

and professional life of the city" by regulating membership organizations "[w]here business deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed." (JS at 27a.)

For lawyers and other professionals, the opportunity to meet in the collegial and congenial setting that a business-oriented club provides is recognized as a valuable professional asset, in part because success in the professions depends on:

intense socialization of their members, much of it by immersion in the norms of professional culture. . . . These controls depend on a strong network cemented by bonds of common background, continued association, and affinity of interests.

Cynthia Fuchs Epstein, *Encountering the Male Establishment: Sex-Status Limits on Women's Careers in the Professions*, 75 AMERICAN J. SOCIOLOGY at 965, 972 (1970).

Conversely, being excluded from this setting is a professional liability on several levels:

The most direct harms involve lost opportunities for the social status, informal exchanges, and personal contacts that men's associations traditionally have provided. . . . Such clubs have provided forums for exchanging information and developing relationships that generate business or career opportunities. In a society in which men obtain almost one-third of their jobs through personal contacts, and probably a higher percentage of prestigious positions, the commercial role of social affiliations should not be undervalued. Nor should their political significance be overlooked. Elite, all-male associations such as the Bohemian or Cosmos clubs often have been the focus of private discussions that later emerged as public policy.

Rhode, *Association and Assimilation*, 81 Nw. L. Rev. 106, 121 (1986).

Beyond the indignity of their systematic exclusion from membership, woman lawyers invited to business functions that routinely take place in New York City clubs (such as meetings with clients, firm lunches and dinners, and job interviews) are often confronted by additional discrimination: exclusion from club facilities that are available to male non-members.⁵ This symbolic way of telling women they are not welcome is a particularly destructive form of discrimination, reinforcing an insider/outsider mentality, and leading, possibly, to self-exclusion and ambivalence toward success. Robert K. Merton and Elinor Barber, *Sociological Ambivalence in Sociological Ambivalence and Other Essays*, 3-32 (Robert K. Merton, ed., 1976).⁶ Not wanting to join a group that does not want you is a behavior which:

results largely from the image of a profession as a society of men, an image many male practitioners would like to perpetuate. Men accomplish this most effectively by convincing the woman that she does not belong and should not want to belong. Most women get the message, and for

⁵ According to a recent newspaper report: women guests at the Links Club are required to use the elevator instead of the stairs, and are excluded from the Club's main dining room except on twice-weekly "Ladies' Nights"; the Brook Club does not have any women's bathroom; women guests at the City Athletic Club are banned from the main dining room during working hours; women guests at the Union League Club are barred from the main dining room and two cafes, and from the main lounge during certain hours; and prior to the University Club's settlement of a complaint by the New York City Human Rights Commission under Local Law 63, the club excluded women from its main dining room before 7 p.m., and from its fitness center, tap room, and grill room. *Crain's New York Business*, October 19, 1987 at p. 3, col. 1.

⁶ For a discussion of the ambivalence that women experience due to perceptions of professional discrimination, see Cynthia Fuchs Epstein, *Ambivalence and Collegiality in Women in Law* 265-302 (1981); Rosabeth Moss Kanter, *Men and Women of the Corporation* (1977); Virginia E. O'Leary, *Some Attitudinal Barriers to Occupational Aspirations in Women*, 81 *PSYCHOLOGICAL BULLETIN* 809-826 (1974).

those who don't there are the explicit devices of separate women's entrances to clubs normally limited to male members The separate "white" and "colored" doors to public places in the recent past were condemned as unjust and demeaning to black people by many persons who feel that separate women's entrances are part of an acceptable tradition.

Cynthia Fuchs Epstein, *Women's Place: Options and Limits in Professional Careers*, at 176-177 (1970).

A justification advanced by the Club Association for limiting its member clubs to "people like us," is that "they have their own clubs," which the Club Association predicts will be decimated if Local Law 63 is upheld: "[w]omen's organizations will be forced to admit men; a gay businessman's association would be forced to admit women; a black businessman's organization would be forced to admit whites," [and] "an Italian anti-defamation league would be forced to admit non-Italians." (Appellant's Brief at 38.) However, this unlikely hypothetical argument misses the significant distinction between separatism imposed by the "haves," and separatism chosen by the "have-nots":

Given this nation's historic traditions and cultural understandings, the exclusion of men from women's liberation groups or garden clubs no more conveys inferiority than the exclusion of whites from black organizations or Protestants from Jewish social organizations.

Rhode, *Association and Assimilation*, 81 *Nw. L. Rev.* at 122 (1986).

The stigma of exclusion from professional organizations was described by Helen Lehman Bittenweiser, an attorney who was among the first of the Association's women members, when she testified before the City Council in 1980. Mrs. Bittenweiser's statement, in support of an earlier version of the legislation that became Local Law 63, provides in part as follows:

Shortly after I was admitted to the New York bar [in 1937] I became a member of the Admissions Committee of the Bar Association. One of my first encounters with the pernicious effects of private clubs exclusionary policies occurred at that time. Association meetings were held at a private club (The Harvard Club) from which women were excluded—although recently for some years now the Harvard Club has not discriminated. Although I was a member of the Admissions Committee of the Bar Association, I was not permitted to enter through the carpeted main entrance because I was a woman. Instead, I had to enter through a side entrance and stand in front of an elevator to wait for a male escort. On one occasion, I was harassed by club employees because I was standing on the carpet by the elevator. At another such club there was a small room near the side entrance where the women were again to await a male member before entering the meeting area.

Similarly, I recall encountering the same problems as a member of the Legal Aid Society. The Society's luncheons were held at a private club (The Downtown Association) that had an express policy of excluding women and Jews. After raising objection to holding luncheons there, the Legal Aid Society moved its luncheons to The Lawyer's Club. The Lawyer's Club had just changed its exclusionary policy, during World War II to permit admission of women. However, the only woman that actually applied and became a member was a magistrate.

* * *

Professionally, I had to deal with humiliation that was the direct result of the discriminatory policies of private clubs. More than the humiliation, however, it is important to emphasize that the policies of these clubs have always been and continue to be a handicap to women in the professional and business world. It is only recently that women have begun entering positions that were previously

the exclusive domain of men. The struggle has been long and arduous. The policies of the private clubs that make arbitrary and unjustifiable discrimination have the effect of placing the excluded groups at a considerable disadvantage.

Testimony of Helen Bittenweiser, Esq. in support of Int. No. 801, before the General Welfare Committee of the New York City Council on July 30, 1980, at 5-7.

The discrimination encountered by Mrs. Bittenweiser over forty years ago is still being experienced by New York City attorneys in the disadvantaged groups which have been traditionally underrepresented in the legal profession.⁷ New York City, justifiably concerned with breaking this cycle of discrimination, enacted Local Law 63 so that these disadvantages will not be perpetuated. This Court should affirm the decision below and thereby confirm the validity of this important legislation.

⁷ In a 1985 survey of 42,107 lawyers in 246 of the nation's 250 largest law firms, 6.03% of the partners were women, .73% of the partners were Black, and .33% of the partners were Hispanic. *National L.J.*, December 23, 1985, at p.1, col. 3.

The median personal income for male lawyers nationally, according to a September 1987 survey by the *Journal of the American Bar Association*, was \$71,710; the median income for women lawyers was \$40,190. *N.Y.L.J.*, December 15, 1987, p.1, col. 5.

CONCLUSION

For the reasons stated above, the Association, through its Committees on Civil Rights and Sex and Law, urges this Court to affirm the decision of the New York Court of Appeals that Local Law 63 is constitutional.

Respectfully submitted,

ROBERT M. KAUFMAN
President
The Association of the
Bar of the City of
New York

Of Counsel:

JONATHAN LANG
ARTHUR LEONARD
JANE E. BOOTH
EVELYN F. COHN
MARY SUE HENIFIN
PRISCILLA LUNDIN
KAY C. MURRAY

MOTION

MOTION FILED

JAN 13 1988

86-1836

(21)

No. 86-1300

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

NEW YORK STATE CLUB ASSOCIATION, INC.,

Appellant,

—v.—

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF NEW
YORK, THE CITY HUMAN RIGHTS COMMISSION and THE
MEMBERS OF THE CITY HUMAN RIGHTS COMMISSION,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

**MOTION FOR LEAVE TO FILE AND
BRIEF OF AMICI CURIAE**

**NOW Legal Defense and Education Fund; American
Association of University Women; American Jewish
Committee; American Jewish Congress; Americans for
Democratic Action; Association of Black Women Attor-
neys of New York; California Women Lawyers; Con-
necticut Women's Educational and Legal Fund, Inc.;
Equal Rights Advocates; Financial Women's Association
of New York; Hawaii Women Lawyers; Hawaii Women
Lawyer's Foundation; Metropolitan Women's Bar Asso-
ciation; NAACP Legal Defense and**

(caption and counsel continued on inside front cover)

100 P

MOTION FOR LEAVE TO FILE
AS AMICI CURIAE
ON BEHALF OF APPELLEES

**Educational Fund, Inc.; National Coalition of Labor Union Women; National Conference of Women's Bar Associations; National Organization for Women; National Organization for Women-New York City; National Organization for Women-New York State; New York City Commission on the Status of Women; New York Coalition of 100 Black Women; New York Women in Communication; New York Women's Bar Association; Northwest Women's Law Center; San Francisco Women Lawyers Alliance; Women Employed; Women and Foundations/Corporate Philanthropy; Women's Action Alliance; Women's Bar of the District of Columbia; Women's Bar Association of the State of New York; Women's Law Project; Women's Legal Defense Fund
In Support of Appellees.**

Counsel of Record:

LYNN HECHT SCHAFRAN
SARAH E. BURNS
NOW Legal Defense
and Education Fund
99 Hudson Street
Suite 1201
New York, N.Y. 10013
(212) 925-6635

Of Counsel:

JUDITH I. AVNER
54 Fernbank Ave.
Delmar, N.Y. 12054
(518) 439-7752

BEVERLY GROSS
525 West End Ave.
New York, N.Y.
(212) 877-8109

Pursuant to Rule 36.3 of the Rules of this Court the American Association of University Women, American Jewish Committee, American Jewish Congress, Americans for Democratic Action, Association of Black Women Attorneys of New York, California Women Lawyers, Connecticut Women's Educational and Legal Fund, Inc., Equal Rights Advocates, Financial Women's Association of New York, Hawaii Women Lawyers, Hawaii Women Lawyer's Foundation, Metropolitan Women's Bar Association, Naacp Legal Defense and Educational Fund, Inc., National Coalition of Labor Union Women, National Conference of Women's Bar Associations, National Organization for Women, National Organization for Women-New York City, National Organization for Women-New

York State, New York City Commission on the Status of Women, New York Coalition of 100 Black Women, New York Women in Communication, New York Women's Bar Association, Northwest Women's Law Center, San Francisco Women Lawyers Alliance, Women Employed, Women and Foundations/Corporate Philanthropy, Women's Action Alliance, Women's Bar of the District of Columbia, Women's Bar Association of the State of New York, Women's Law Project, Women's Legal Defense Fund in Support of Appellees seek permission of this Court for leave to join the brief *amicus curiae* of the NOW Legal Defense and Education Fund (NOW LDEF) in support of appellees in this case. The brief of *amicus curiae* is submitted herewith.

The grounds for granting the motion for leave are as follows:

1. NOW LDEF requested permission from Appellant and Appellees to file a Brief of *Amici Curiae* on behalf of itself and other interested organizations in the above captioned case. Permission was sought by letter to appellant's counsel, Phillips, Nizer, Benjamin, Krim & Ballon, 40 West 57th Street, New York, N.Y., dated October 27, 1987 and by telephone from counsel for appellees, the New York City Corporation Counsel, 100 Church Street, New York, N.Y. 10007. As noted above, the permission sought requested approval for a brief to be filed by the "NOW Legal Defense and Education Fund ... on behalf of itself and other interested organizations..."

Counsel for appellees gave consent by letter dated January 7, 1987 [sic] from Leonard J. Koerner, a copy of which is attached. Counsel for appellant gave consent by letter dated November 4, 1987

from Alan Mansfield, a copy of which is attached, to the filing of a brief amicus curiae by the NOW Legal Defense and Education Fund only. Counsel for appellant has refused NOW LDEF's request to expand that permission to include the thirty-two organizations listed above.

2. These thirty-two organizations have a vital interest in this case. As described in the Statement of Interest in the brief submitted herewith, they are national and state organizations, open to women and men, committed to achieving equal opportunity for women and minorities in the business, professional and civic life of our country. Each has a unique perspective and expertise on the case at bar. The members of these organizations are personally aware of the high level of business activity at many of the country's purportedly "private" clubs, and of business opportunities lost to

themselves and others when women and minorities are barred from membership at these business oriented clubs.

Many of these organizations' members have been in the difficult position, when invited to attend business functions at these clubs as guests or directed to attend them by an employer, or having to decide whether the business opportunity or the employer's directive outweighs their personal repugnance at having to attend a business event in a discriminatory setting. When attending business functions at these "private" clubs, many of these organizations' women members have been personally humiliated by being directed by club personnel not to sit the lobby, use the main elevator, walk on the stairs or enter certain rooms or floor of these clubs.

Because of the direct impact on women's and minorities' full access to

clubs and organizations which are centers of business and decision making activity, these thirty-two organizations have closely followed the progress of the case at bar and similar cases. Many of these organizations appeared before this Court as amici in Roberts v. Jaycees, 468 U.S. 609 (1984) and Rotary Club v. Directors of Rotary International, 481 U.S. ___, 107 S.Ct. 1940 (1987) and before the New York Court of Appeals in the case at bar, New York State Club Association, Inc. v. City of New York, 69 N.Y.2d 211 (1987).

The individual Statements of Interest of these thirty-two organizations appear as an Appendix to the brief submitted herewith.

3. The thirty-two organizations listed above request that this Court grant permission for leave to join the attached brief amicus curiae of the NOW LDEF in support of appellees.

Respectfully submitted,

Lynn Hecht Schafran
NOW Legal Defense and
Education Fund
99 Hudson St., 12th Floor
New York, N.Y. 10013
(212) 925-6635

Counsel of Record for
Amici Curiae

Dated, January 11, 1988

[Letterhead of THE CITY OF NEW YORK,
Law Department, New York, N.Y.]

January 7, 1987

Lynn Hecht Schafran
N.O.W. Legal Defense and
Education Fund
99 Hudson Street - 12th Floor
New York, New York 10013

Re: *NYS Club Assoc. Inc. v. City of New York*
Supreme Court Docket No. 86-1836

Dear Ms. Schafran:

You have requested appellees' consent for your client, N.O.W. Legal Defense and Education Fund and other interested parties to appear as *amici curiae* in the United States Supreme Court where this case is now pending. Appellees have no objection to the participation of N.O.W. and the other interested parties as *amici curiae*.

Very truly yours,

/s/ LEONARD J. KOERNER
Leonard J. Koerner
Chief Assistant Corporation Counsel

[Letterhead of PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON, New York, N.Y.]

November 4, 1987

Lynn Hecht Schafran, Esq.
NOW Legal Defense and Educational Fund
99 Hudson Street
12th Floor
New York, New York 10013

Re: *New York State Club Association, Inc. v.*
The City of New York, et al.

Dear Ms. Schafran:

In accordance with your request, appellant New York State Club Association, Inc. hereby consents to the filing of a brief *amici curiae* by the NOW Legal Defense and Educational Fund in accordance with Supreme Court Rule 36.2.

Sincerely,

/s/ ALAN MANSFIELD
Alan Mansfield
Counsel of Record

/jhm

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<u>United States Power Squadrons v. State Human Rights Appeals Board</u> , 59 N.Y.2d 401 452 N.E.2d 1199 (1983).....	49
<u>Village of Belle Terre v. Boraas</u> , 416 U.S. 1 (1974).....	36
<u>Zablocki v. Redhail</u> , 434 U.S. 473 (1978).....	35
<u>City Council v. Taxpayers for Vincent</u> , 466 U.S. 789, (1984)..	54
<u>Norwood v. Harrison</u> , 413 U.S. 455, 469 (1977).....	53
 <u>State Cases</u>	
<u>New York State Club Association, Inc. v. City of New York</u> , 69 N.Y.2d at 211, 505 N.E.2d 915, 513 N.Y.S.2d 349 (1987).....	49,50, 53
 <u>Constitutional Provisions</u>	
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 <u>Statutes and Orders</u>	
Buffalo, N.Y. Ordinance Amendment - New Article XXIII Added to Ch. VII - Discriminatory Practices Concerning Membership or Facilities (Sept. 16, 1987)...	32

Cal. Admin. Code, tit. 18, ch.3, Subch. 2.5 and 3.5, §§ 17201 and 24343 (Amended 1987).....	34
Cal. Code of Jud'l Conduct, Canon 2C (Deering's Cal. Ann. Codes, Rules [Appen.] (1987 Pocket Supp.).....	29
Commentary to Canon 2 of the U.S. Code of Judicial Conduct, Adopted by the United States Judicial Conference on Mar. 13, 1981.....	30
District of Columbia Law 7-50, Amendment to, Sec. 102(x) of the Human Rights Act of 1977 (D.C. Law 2-38; D.C. Code, Sec. 1-2502 [24]) (Effective Dec. 10, 1977).....	33
Exec. Order No. 17; Governor Mario M. Cuomo, <u>Establishing State Policy on Private Institutions Which Discriminate</u> May 31, 1983.....	31
Exec. Order No. 69, Mayor Edward I. Koch, <u>Prohibition of the Conduct of City Business at Private Clubs that Engage in Discriminatory Membership Practices</u> Sept. 28, 1983.....	31
Los Angeles, Cal. Ordinance No. 162426, adding Sec. 59 to Chpt. IV of the L.A. Municipal Code.....	32,33

N.Y.C. Admin. Code, Title 8, § 8-101.....	17
(Local Law 63) N.Y.C. Admin. Code, § 8-102(9) (1984).....	passim
Philadelphia Code, Ch. 17-400 and § 20-307 (1980).....	31
Philadelphia, Pa. Bill No. 581, Ch. 9-1100 of the Philadelphia Code (Introduced May 16, 1985).	33
Rule of the Boston Licensing Board on Membership in Clubs (Adopted July 21, 1987).....	33
Rules of the Chief Judge, 22 NYCRR 20.21 (Adopted Nov. 24, 1980).....	32
San Francisco, Cal. article 33 (b)(Part 11) Ch.VIII of the San Francisco Municipal Code (Dec. 17, 1987).....	33
Treas. Reg. 1.274-2(e)(4)(iii) (1982).....	47
26 U.S.C. § 162 (West 1978)...	47
Utah Code of Jud'l Conduct, Canon 2, Utah Jud'l Council Reference Book (1987).....	29
Wilmington, De. Ordinance No. 87,063 (Sept. 30, 1987).....	33

Articles, Books, and Studies

<u>Admit Women? No Deal</u> , Letter from George W. Ball to the N.Y. Times, Jan. 14, 1983, at A18, col. 1.....	39
<u>American Air's Low-Cost Program</u> , N.Y. Times, Mar. 1, 1984, at D1, col. 2.....	43
Ansberry, <u>Board Games</u> , Wall St. J., Mar. 24, 1985, at 4D, col. 1.....	14
<u>Apartheid Discussion at an All- Male Club</u> , N.Y. Times, Nov. 11, 1985, at A18, col. 3.....	43, 44
Avner & Bachrach, <u>Let's Make A Deal - When Private Means Busi- ness</u> , N.Y. St. B.J. Oct. 1985 at 12.....	5
Bartlette, Poulton-Callahan & Somers, <u>What's Holding Women Back</u> , Mgmt. Weekly, Nov. 8, 1982.....	15
Bell, <u>Power Networking</u> , Black Enterprises 111 (Feb. 1986)...	15
Bettner, <u>Executive Dreams: What Benefits to Request Under New Tax Law</u> , Wall St. J., Oct. 28, 1986 at 37, col. 3.....	47
Bracewell, <u>Sanctuaries of Power</u> , Houston City Mag., May 1980 at 50.....	5

Bureau of Labor Statistics, U.S. Dep't of Labor, <u>Job Seeking Methods Used by American Workers</u> , Bull. No. 1886, Table 3 (1972)..	12
Burns, <u>The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality</u> , 18 Harv. C.R.-C.L. 321 L. Rev. (1983)..	5,9,47, 48
<u>Business Has No Business at Century Club</u> , Letter from Theodore H. White to the N.Y. Times, Nov. 17, 1984 at A22, col. 4...	39
C. Kleiman, <u>Women's Networks</u> (1980).....	12
<u>California Lawyers Move On All-Male Clubs</u> , N.Y. Times, Aug. 31, 1986, at 35A, col. 1	29
<u>Century Club's Timesmen Stuck with the Tab</u> , N.Y. Post, Dec. 12, 1983, at 6, col. 1.....	27
Commission on Professionals in Science and Technology, <u>Professional Women and Minorities: A Manpower [sic] Data Resource Service</u> (1987).....	16
Diamond, <u>The Tisch is in the Mail</u> , N.Y. Sept. 1, 1986, (Mag.) at 36.....	42
Executive Compensation Services, Inc., <u>Executive Perquisites Report 1986/87</u> , (1986).....	48

Fitzgerald, <u>Fun 15 Months of the Year</u> , N.Y. Times, Book Review, Nov. 3, 1985, at 1.....	40
Francke, <u>Club Mad</u> , N.Y. June 2, 1980, at 29.....	44
Ginsburg, <u>Women as Full Members of the Club: An Evolving American Ideal</u> , 6 Hum. Rts. 1 (1975).	5,16,17
<u>Harlem Housing Failure: Jailed Landlord Says He Lost to System</u> , N.Y. Times, Mar. 24, 1984, at B25, col. 3.....	41,42
Hollingsworth, <u>Sex Discrimination in Private Clubs</u> , 29 Hastings L.J. 417 (1977).....	5,15
Howell, <u>Man's Place</u> , Daily News, June 4, 1980, at 37, col. 1....	27
Hymowitz & Schellhardt, <u>The Glass Ceiling</u> , Wall St. J., Mar. 24, 1986, at 1D, col. 1.....	13
<u>Improved Braniff Aid Plan Reported</u> , N.Y. Times, Apr. 1983, at 29, col. 1.....	42
Korn/Ferry Int'l <u>Board of Directors Fourteenth Annual Study</u> (1987).....	14
Korn/Ferry Int'l, <u>Executive Profile Study: A Survey of Corporate Leaders in the Eighties</u> , (1986).....	14

<u>Legal Couples, Balancing Act,</u> Legal Times of N.Y., Nov. 21, 1983, at 1, col. 1.....	43
<u>Leinster, Black Executive: How</u> <u>They're Doing,</u> Fortune, Jan. 18, 1988 at 109.....	13
<u>Lynton, Behind Closed Doors:</u> <u>Discrimination by Private Clubs:</u> <u>A Report Based on City Commis-</u> <u>sion on Human Rights Hearings,</u> N.Y.C. Commission on Human Rights (1975).....	5,10,19
<u>"Male" Clubs: Bar Leaders are</u> <u>Members,</u> The Recorder, July 22, 1986 at 1.....	23,48
<u>Night Full of Literary Parties</u> <u>Attracts Big Names,</u> N.Y. Times, Oct. 25, 1984, at B1, col. 1....	40,41
<u>O'Brien, Women Helping Women,</u> Det. Free Press, Nov. 13, 1978..	11,12
<u>Ralph: Get Dressed,</u> N.Y. Post, Apr. 30, 1984, at 6, col. 1.....	42
<u>Reibstein, Many Hurdles, Old and</u> <u>New, Keep Black Managers Out of</u> <u>Top Jobs,</u> Wall St. J., July 10, 1986, § 2 at 1.....	14,15
<u>Ryback, Encounters at the Schloss,</u> Harv. Nov.-Dec. 1987 (Mag.), at 67.....	39

<u>Schafran, Welcome to the Club!</u> <u>(No Women Need Apply),</u> Women and Foundations/Corporate Philan- thropy, N.Y. (1981).....	5
<u>Schanberg, Some of Their Best</u> <u>Friends,</u> N.Y. Times, Mar. 26, 1983, at A23, col.4.....	39
<u>Shumer, A Woman at Old Exeter,</u> N.Y. Times, Oct. 11, 1987 (Mag.), at 98.....	40
<u>The All-Male Club: Threatened</u> <u>On All Sides,</u> Business Week, Aug. 11, 1980, at 90.....	5,46
<u>Three Writers Win Book Awards,</u> N.Y. Times, Nov. 16, 1984, at C32, col. 1.....	40
<u>Topics: Witness,</u> N.Y. Times, Oct. 29, 1984, at A22, col. 1.....	38
<u>2 Utilities Halt Dues for De-</u> <u>troit Men's Club,</u> N.Y. Times, Feb. 12, 1986, at 10, col. 5..	27
<u>U.S. Dep't of Commerce, 1982</u> <u>Economic Censuses, WB82-1 Women</u> <u>Owned Businesses</u> (1986).....	16
<u>U.S. Dep't of Commerce, 1982</u> <u>Survey of Minority Owned Busi-</u> <u>ness Enterprises, MB82-1 Black,</u> (1986), MB82-2, <u>Hispanic</u> (1986), MB82-3 <u>Asian Americans,</u> <u>American Indians and Other</u> <u>Minorities</u> (1986).....	16

<u>Vogel, The Trend Setting Traditionalism of Architect Robert A.M. Stern, N.Y. Times, Jan. 14, 1985 (Magazine), at 41.....</u>	39
<u>Weiner, Tax Tips: When Record Keeping Pays Off, U.S. News and World Report, Mar. 17, 1986, at BC-2.....</u>	46,47
<u>Wise, A Who's Who of Tax Lawyers, N.Y.L.J., June 20, 1983, at 1, col. 1.....</u>	43
<u>Women Slowly Enter Upper Management: Companies Devise Ways to Assist Them, 5 Employee Relations Weekly (BNA) 1123 (Sept. 14, 1987).....</u>	13
 <u>Other Authorities</u>	
<u>Babcock & Kay, Statement Submitted to the Senate Comm. on the Judiciary, June 23, 1979</u>	25
<u>Bank of America 1980 Expense Account Guidelines.....</u>	27
<u>CBS, Policy. Delegations of Authority, Reimbursable Business Expenses, Par. 16, (Adopted Jan. 31, 1981).....</u>	27,42
<u>Club Membership Practices of Financial Institutions: Hearing Before the Senate Comm. on Banking Housing, and Urban Affairs, 96 Cong., 1st Sess. 172 (1979)..</u>	10,11

<u>Columbia University, Resolution Concerning University Participation in Clubs with Discriminatory Admissions Policies, (Adopted Jan. 23, 1981).....</u>	30
<u>Comments of the National Club Association re Regulations Proposed by the Dep't of Labor, OFCCP, Dealing with Payments by Federal Contractors to Private Organizations (Mar. 24, 1980).....</u>	46
<u>"Council Policy on the Use of Private Clubs," Council on Foundations (Adopted Oct. 19, 1981).....</u>	28
<u>Guidelines for Extra-Judicial Activities and Report of [New Jersey] Supreme Court on Extra-Judicial Activities, Sec IV (D)(1) (Oct. 1987).....</u>	30
<u>IBM, Position of Non-Support for Organizations or Service Clubs Which Exclude Persons on the Basis of Race, Color, Sex, Religion or National Origin (Adopted 1980).....</u>	27
<u>Letter of J. Wilson Newman, President, University Club (New York City) dated Mar. 31, 1980.....</u>	45
<u>Memorandum from Lowdrick M. Cook, Chairman and CEO of ARCO to ARCO Senior Management (May 28, 1986).....</u>	27

Memorandum of President C. Peter McGrath, University of Minnesota (June 1984).....	30
New York State Bar Association, Resolution (Adopted Jan. 23, 1981).....	28
"Policy on Situs of Association Council Meetings and Situs of Meetings Of Association Officers and Staff," The Ass'n of the Bar of the City of N.Y. (Adopted Apr. 9, 1981).....	28
Resolution of the New York County Bar Association Respecting Use of Discriminatory Clubs (Adopted Apr. 14, 1986).....	28
San Francisco Bar Association Resolution (Adopted June 11, 1986).....	29
Statement of Patricia Hewitt before the N.Y.C. Council Comm. on General Welfare July 30, 1980.....	21,22
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Testimony of Henry G. Miller before the N.Y. Task Force on Women in the Courts, Nov. 19, 1985.....	41
Testimony of Muriel Siebert before the New York City Commission on Human Rights, Nov. 13, 1975.....	20
"The Use of Private Clubs for Association Functions," American Bar Association (Adopted Oct. 1973).....	28
USC Transcript (Dec. 2, 1985)..	30,31

I.

**STATEMENT OF INTEREST
OF AMICI CURIAE**

Amici are national and state organizations, open to women and men, committed to achieving equal opportunity for women and minorities in the business, professional and civic life of our country. Amici's individual statements of interest appear in Appendix A. Amici's members are personally aware of the high level of business activity at many of the country's purportedly "private" clubs, and of the lost business opportunities to themselves and to others when women and minorities are barred from membership at these business oriented clubs. Many of amici's members have been in the difficult position, when invited to attend business functions at these clubs as guests or directed to attend them by an employer, of having to decide whether the

business opportunity or the employer's directive outweighs their personal repugnance at having to attend a business event in a discriminatory setting. When attending business functions at these "private" clubs, many of Amici's women members have been personally humiliated by being directed by club personnel not to sit in the lobby, use the main elevator, walk on the stairs, or enter certain rooms or floors of these clubs. Because of its direct impact on women's and minorities' full access to clubs which are centers of business and decision making activity, Amici have closely followed the progress of the case at bar and are deeply concerned with its outcome.

II.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth by Appellee, The City of New

York, The Mayor of the City of New York, The City Human Rights Commission and the Members of the City Human Rights Commission.

III.

SUMMARY OF ARGUMENT

Purportedly "private" business related clubs confer significant business advantages on their members. Local Law 63 narrowly serves the profoundly important state interest of ensuring nondiscriminatory access to the commercial opportunities afforded by membership in such clubs. Discriminatory membership policies at these clubs have a deleterious effect on the professional opportunities and advancement of women and minorities.

Application of Local Law 63 to business-related clubs does not infringe members' First Amendment rights of either intimate or expressive association.

Because of the size and high level of business activity at the clubs affected by Local Law 63, they can have no legitimate expectation of a protected right of intimate association. The business related clubs affected by Local Law 63 do not engage in the types of expressive activities protected by the First Amendment. If there is any infringement of club members' freedom of expressive association, it is outweighed by New York City's compelling interest in removing barriers to the economic advancement and political and social integration of all its citizens.

IV

ARGUMENT

A. INTRODUCTION

In recent years, the impact on women and minorities of exclusion from so-called "private" clubs and organizations that are in fact centers of business activity has

received wide attention.¹ Such exclusion deprives women and minorities of equal economic opportunity, subjects them to personal humiliation and, by barring them from informal centers of power, confirms in majority group men the belief that women and minorities are inappropriate participants where formal power is exercised. An understanding that such exclusion is

¹ See, e.g., Avner and Bachrach, Let's Make a Deal - When Private Means Business, N.Y. St. Bar J., Oct. 1985, at 12; Burns, The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality, 18 Harv. C.R.-C.L. 321 L. Rev. (1983); Schafran, WELCOME TO THE CLUB! (No Women Need Apply) Women and Foundations/Corporate Philanthropy, N.Y. (Apr. 1981); The All-Male Club: Threatened On All Sides, Business Week, Aug. 11, 1980, at 90; Bracewell, Sanctuaries of Power, Houston City Magazine, May 1980, at 50; Hollingsworth, Sex Discrimination in Private Clubs, 29 Hastings L.J. 417 (1977); Lynton, Behind Closed Doors: Discrimination by Private Clubs: A Report Based on City Commission on Human Rights Hearings, New York City Commission on Human Rights (1975); Ginsburg, Women as Full Members of the Club: An Evolving American Ideal, 6 Hum. Rts. 1 (1975).

neither unimportant nor benign and that there is indeed extensive business activity at so-called "private" clubs is implicit in the resolutions, executive orders and personnel policies recently promulgated by numerous organizations, government officials, corporations and academic institutions barring the conduct of official business at discriminatory clubs and other facilities, and the response of municipalities across the country to the enactment of Local Law 63. N.Y.C. Admin. Code

§ 8-102(9) (1984). See page 27-35 infra.

The challenged amendment to New York City's public accommodations law is a legislative acknowledgment of what these organizations, government officials, corporations and academic institutions have already recognized: the business nature of many so-called "private" clubs. Local Law 63's definition of clubs which are "dis-

tinctly private in nature" to exclude those which are in fact centers of business activity is a constitutionally valid effort on the part of the city to remove discriminatory barriers to women's and minorities' full participation in the business, professional, civic and political life of the community.

As this Court wrote in Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984), commenting on Minnesota's public accommodations law:

Like many States and Municipalities, Minnesota has adopted a functional definition of public accommodations that reaches various forms of public, quasi-commercial conduct This expansive definition reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women. (Citations omitted.)

B. THE STATE HAS A "PROFOUNDLY IMPORTANT" INTEREST IN ENSURING NONDISCRIMINATORY ACCESS TO COMMERCIAL OPPORTUNITIES.

As in Roberts v. United States Jaycees, 468 U.S. 609 (1984) and Rotary Club v. Directors of Rotary Int., 481 U.S. ___, 107 S.Ct. 1940 (1987), this case requires the Court to "address a conflict between a State's efforts to eliminate gender-based discrimination against its citizens and the constitutional freedom of association asserted by members of a private organization." Roberts, 468 U.S. at 612. In this case we address discrimination on the basis of race, creed, color and national origin, as well. New York City has enacted legislation to further the compelling state interest of assuring that women and minorities will not be denied access to the commercial advantages available through membership in "private" clubs engaged in substantial business

activity. The same objective was deemed to be a "compelling state interest[]" of the highest order" in Roberts, 468 U.S. at 624 and Rotary, 481 U.S. at ___, 107 S.Ct. at 1948.

It is well documented that exclusive clubs and organizations afford their members unique opportunities for business contacts and business deals. A study sponsored by the American Jewish Committee revealed that more than half the corporate executives interviewed believed clubs provided valuable business contacts; over two-thirds reported that such membership adds to one's status in his firm or community. Burns, supra note 1, quoting R. Powell, The Social Milieu as a Force of Executive Promotion 105 (1969). After holding extensive hearings on business-oriented private clubs the New York City Commission on Human Rights concluded:

Irrespective of the reasons, major companies, banks, law firms and trade and professional associations routinely use club facilities rather than public accommodations [sic] for meetings of all kinds, informal and formal . . . [W]itnesses testified from personal experience that clubs are the preferred setting for scheduled group meetings ranging from the inner circle of a particular firm, to the leaders of an industry, profession or governmental agency, to special events at which prominent persons address a select audience on matters of special or general current interest.

Lynton, supra, n.1 at 15.

At Congressional hearings investigating the payment of "private" club dues by financial institutions, Vern Atwaters, former chairman of Central Savings Bank, testified:

I believe that access to membership in private clubs does have significant career and business value to an executive or professional, whether or not actual business or banking negotiations are conducted at the club. The opportunities for convenient and friendly association with clients, colleagues or prospects in a congenial setting is con-

ducive to the establishment of longer term business relationships which may have future value to an individual's career or business.

Club Membership Practices of Financial Institutions: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs, 96th Cong., 1st Sess. 172 (1979).

In essence, private clubs provide members with an entree to the "Old Boy Network", which provides majority group men with knowledgeable allies who help them advance in their careers, teach them the cast of characters, and advise them of job openings and business opportunities. The importance of access to such networks cannot be overestimated. The Detroit Free Press has described the Old Boy Network as "where the power really is . . . the mechanism that gives men a chance to push the right buttons and meet the right people at the right time." O'Brien, Women Helping

Women, Det. Free Press, Nov. 13, 1978. Promotions and high-level jobs are often based on the personal relationships forged in the closed meetings of private clubs. The Bureau of Labor Statistics reported that almost one-third of all jobs men hold come through personal contacts. U.S. Dep't of Labor, Bureau of Labor Statistics, Job Seeking Methods Used by American Workers, Table 3 (1972). The percentage is believed to be even higher for high-level positions. C. Kleiman, Women's Networks 2 (1980).

Women and minorities need access to informal career-enhancing networks at least as much as majority group men. Despite the gains that women and minorities have made in the job market in the last 20 years, they have not attained the same professional status as their white male colleagues. Although women now fill nearly one-third of all management positions, most

are in jobs which command little authority and relatively low pay. Hymowitz & Schellhardt, The Glass Ceiling, Wall St. J., Mar. 24, 1986, at 1D, col. 1. A 1986 survey of 586 organizations found that 71 percent of respondents had only one or no female executives. Women Slowly Enter Upper Management, 5 Employee Relations Weekly (BNA) 1123 (1987) citing Hansen Survey of Executive Compensation Practices and Perquisites (1986). With respect to minorities, a 1986 survey of 400 Fortune 1,000 companies by the Rutgers University Graduate School of Management and the Program to Increase Minorities in Business found that less than 9% of all managers were blacks, Asians or Hispanics. Leinster, Black Executives: How They're Doing, Fortune, Jan. 18, 1988 (Magazine) at 109. A recent survey of 1,362 senior executives in positions just under chief executive at

the nation's largest companies found just 29 women and 4 blacks. Korn/Ferry International, Executive Profile Study: A Survey of Corporate Leaders in the Eighties 23 (1986).

Of 532 firms responding to a 1986 board of directors survey only 43% had a woman on the board. Even fewer, 30%, had a minority on the board. Korn/Ferry International, Board of Directors Fourteenth Annual Study at 6 (1987). Women hold only three to four percent of Fortune 1000 directorships. Ansberry, Board Games, Wall St. J., Mar. 24, 1985, at 4D, col.1.

Aspiration, drive and talent are not enough for women and minorities seeking to equal the professional accomplishments of their majority group male counterparts. As stated by John L. Jones, a black corporate executive, there is an "invisible ceiling that blacks, and women as well, hit as they

move up the corporate ladder, regardless of their achievements, motivation, preparation and training." Reibstein, Many Hurdles, Old and New, Keep Black Managers Out of Top Jobs, Wall St. J., July 10, 1986, at § 2, p. 1. Women and minorities need the informal contacts, networking, and professional support that membership in purportedly "private" clubs offers. See Bartlette, Poulton-Callahan & Somers, What's Holding Women Back, Management Weekly, Nov. 8, 1982; Hollingsworth, supra, n.1 at 420 ("The exclusion of a segment of the population from such private clubs works to severely limit the economic mobility of that segment."); Bell, Power Networking, Black Enterprise 111 (Feb. 1986) ("[T]o be truly successful, you have to become a part of the internal, often invisible, old boy network, too.")

At one time, when few women and minorities aspired to the positions of influence and affluence traditionally held by majority group men, the question of access to "private" business oriented clubs may have seemed of de minimis importance. But the increasing number of minorities and women taking professional, business and management degrees and opening their own businesses,² demonstrates the need for access to what Judge Ruth Bader Ginsburg has called "places for profitable exchanges with business and professional colleagues and clients, . . . settings where indivi-

² See generally Commission on Professionals in Science and Technology, Professional Women and Minorities: A Manpower [sic] Data Resource Service (1987); and U.S. Department of Commerce, 1982 Survey of Minority Owned Business Enterprises, MB82-1 Black (1986), MB82-2 Hispanic (1986), MB82-3 Asian Americans, American Indians and Other Minorities (1986) and U.S. Department of Commerce, 1982 Economic Censuses WB/82-1 Women Owned Businesses (1986).

duals pursuing career-related ventures have opportunities to display their talents and may be helped on their way." Ginsburg, supra, n.1 at 19. Further, "If women [and minorities] are not offered equal access, if they are not welcomed as full members of the club, they are kept away from a traditional avenue of self-growth, economic and political opportunity and advancement." Id.

The Legislative Declaration preceding Local Law 63 acknowledges that "[o]ne barrier to the advancement of women and minorities in the business and professional life of the city is the discriminatory practices of certain membership organizations where business deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed." N.Y.C. Admin. Code, Tit. 8 § 8-101 (1984).

Local Law 63 itself states that a club "shall not be considered in its nature distinctly private if it has more than four hundred members, provides regular meal service, and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business." N.Y.C. Admin. Code, Tit. 8 § 8-102(9)(c). (Emphasis supplied.) A club which is not "distinctly private" must "evaluat[e] applications for membership. . . without discrimination based on race, creed, color, national origin or sex." Id.

The amendment was narrowly drawn to differentiate between clubs that are truly private and those that are centers of business activity. It was enacted after a four year (1980-1984) legislative process during which the New York City Council

developed extensive documentation respecting discriminatory practices at business related "private" clubs and the harms caused by these practices. This documentation built on similar information gathered through public hearings held by the New York City Commission on Human Rights in 1973. The testimony offered at these hearings makes clear that the clubs reached by Local Law 63 are only those where the prevalence of activities in furtherance of trade or business obviates any countervailing concern that the legislation, in furthering aims of non-discrimination, breaches any rights of free association.

One of the witnesses at the 1973 hearing of the New York City Commission on Human Rights (Lynton at n.1 supra) was Muriel Siebert, the first woman to purchase her own seat on the New York Stock

Exchange. She described in detail the disadvantages she suffered because of exclusion from clubs at which corporate meetings were held, both early in her career and after she established her own firm. Siebert also discussed the reasons why the opportunity for informal contacts at these clubs is a virtual business necessity.

There are a lot of times where men who do not have a luncheon appointment will go up to the Bankers' Club or some of the other clubs and have lunches and they will meet other people in the industry and they will sit and talk. Now...a woman being denied this is denied an essential part of the business because we do a lot of our business at lunch.

Testimony of Muriel Siebert before the New York City Commission on Human Rights, Nov. 13, 1975 at 72-77.

The New York City Council held hearings on Intro. 513, the predecessor to

Local Law 63, in 1980 and 1983.³ At the 1980 hearing Patricia Hewitt, Executive Director of Joint Foundation Support, illustrated the dilemma faced by women and minorities who are required by business necessity to attend meetings at discriminatory clubs despite their personal objections to such clubs.

From my personal knowledge...business is regularly conducted at private clubs which do not accept women as members. Moreover, in my experience, meetings held at these clubs are often those that would be most difficult for me to miss, since they are often called by the lawyers or trustees to whom I am most directly accountable. ...This September, for example, another private foundation in the city is hosting a meeting at the [men only] University Club to which... 300 foundation trustees, staff and other interested persons have been invited.

³ The statements offered in support of Local Law 63 were not transcribed and published by the New York City Council. Because of their importance to the legislative history, the full texts of the statements cited herein have been lodged with the Court.

Statement of Patricia Hewitt before the New York City Council General Welfare Committee, July 30, 1980, at 1-2.

At the same hearing, Gail J. Wright, a black woman attorney appearing on behalf of the Association of Black Women Attorneys of New York, an amicus herein, and the Harlem Lawyers Association, testified about minority attorneys' experiences with the City's business oriented clubs.

The Association of Black Women Attorneys of New York and The Harlem Lawyers Association are most distressed that due to our race we have been denied the opportunity of fully participating in all aspects of the legal and business community. We are aware that at least eight of the major "private clubs" with substantial memberships do not have any blacks-male or female.

Members of both the Association of Black Women Attorneys of New York and the Harlem Lawyers Association experienced trauma after having submitted applications for membership to private clubs only to have requests for consideration go unanswered. Such overt rejection of persons who maintain outstanding professional creden-

tials is degrading, frustrating and embarrassing - a true stigma of inferiority based solely on color or sex. As a result, many members of these two groups have ceased to seek private club membership.⁴

Testimony offered at the 1980 and 1983 New York City Council hearings by the New York City Commission on the Status of Women, an amicus herein, detailed numerous instances of business at "private" clubs, the exclusion of women from such business events, the humiliation of women while in attendance at these events (such as having to use a separate entrance or being

⁴ Statement of Gail J. Wright before the New York City Council General Welfare Committee, July 30, 1980 at 2 and 8.

The President of the Bar Association of San Francisco recently conceded that important legal business, both commercial and professional, is transacted at so-called "private" clubs, stating: "The exclusion of women and minorities [from private clubs] operates as an impediment to their full participation in the legal profession." "Male" Clubs: Bar Leaders are Members, The Recorder, July 22, 1986 at 1.

directed not to sit in the lobby) and the importance of the legislation challenged herein. The Commission's 1983 testimony concluded:

Women need to be able to meet their clients, colleagues and prospects in what Vern Atwaters, former Chairman of the Board of the Central Savings Bank, has described as "a congenial setting ... conducive to the establishment of longer term business relationships which may have future value to an individual's career or business." Women need not to be demeaned in the course of their business and professional obligations by having to be guests at clubs where they cannot be members or lunch in the main dining room or enter the bar or set foot on certain floors.

Statement on Behalf of the New York City Commission on the Status of Women before the New York City Council General Welfare Committee, Dec. 22, 1983 at 8.

Discriminatory business-related clubs also perpetuate the treatment of women and minorities as second-class citizens. As

two women law professors testified before the United States Senate:

The existence of such clubs today is evidence that there are still many who think that minorities are not fit persons with whom to associate. The exclusion of women from private clubs delivers a different but no less offensive message. It, too, is a reminder that the legal, political, and economic role assigned to women throughout most of our history was a quite restricted one.

Barbara Allen Babcock and Herma Hill Kay, Statement Submitted to the United States Senate Committee on the Judiciary, June 23, 1979, at 1-2.

Our society itself suffers when women and minorities are excluded from the opportunities presented by membership in business-oriented clubs and organizations. This Court has often condemned discrimination based on arcane and stereotypical assumptions about the relative needs and capacities of the sexes or races that bear no relationship to the actual ability of

individuals. See Roberts, 468 U.S. at 625; see also Cal. Fed. Sav. & Loan Ass'n v. Guerra, 481 U.S. ___, 107 S.Ct. 683 (1987). Not only does the exclusion of women and minorities from discriminatory clubs demean an enlightened society by its implicit denigration of these individuals' worth and abilities, it also tangibly injures the commercial and non-commercial foundation of our nation by depriving us of their full contribution. See generally Roberts, 468 U.S. 609.

Corporate America has begun to publicly acknowledge that so-called "private" clubs provide a forum for expansion of commercial activities and that excluding women and minorities from membership in these clubs is discriminatory.

Among corporations, ARCO, Michigan Consolidated Gas Company, CBS, IBM, The New York Times and Bank of America have revoked

their prior policies of paying for their officers to be members of such clubs or reimburse business expenses incurred there.⁵

Among law firms, Sherman & Sterling stopped reimbursing attorneys for dues or business lunches at clubs barring women or minorities when it made its first woman partner.⁶

Numerous organizations, academic institutions and governmental entities have

⁵ Memorandum from Lowdrick M. Cook, Chairman and Chief Executive Officer of ARCO to ARCO Senior Management (May 28, 1986); 2 Utilities Halt Dues for Detroit Men's Club, N.Y. Times, Feb. 12, 1986, at 10, Col 5; CBS, Policy, Delegations of Authority, Reimbursable Business Expenses, Paragraph 16 (Adopted Jan. 31, 1981); IBM, Position of Non-Support for Organizations or Service Clubs Which Exclude Persons on the Basis of Race, Color, Sex, Religion or National Origin (Adopted 1980); Century Club's Timesmen Stuck With the Tab, N.Y. Post, Dec. 12, 1983, at 6, col. 1; Bank of America, 1980 Expense Account Guidelines.

⁶ Howell, Man's Place, Daily News, June 4, 1980, at 37, col. 1.

recently undertaken measures to combat discriminatory membership policies of "private" clubs. The Association of the Bar of the City of New York, New York County Lawyer's Association, New York State Bar Association, American Bar Association and Council on Foundations prohibit their committees, sections and staffs from holding meetings and other official functions at clubs that discriminate.⁷

In 1986, both the Bar Association of San Francisco and the California State Bar

⁷ "Policy on Situs of Association Council Meetings and Situs of Meetings of Association Officers and Staff," The Association of the Bar of the City of New York (Adopted Apr. 9, 1981); Resolution of the New York County Bar Association Respecting Use of Discriminatory Clubs (Adopted Apr. 14, 1986); New York State Bar Association, Resolution (Adopted Jan. 23, 1981); "The Use of Private Clubs for Association Functions," American Bar Association (Adopted Oct. 1978); "Council Policy on the Use of Private Clubs," Council on Foundations (Adopted Oct. 19, 1981).

Board of Governors adopted resolutions urging law firms and corporate legal departments to refrain from scheduling meetings or reimbursing dues or expenses at such clubs. California Lawyers Move on All-Male Club, N.Y. Times, Aug. 31, 1986, at 35A, col. 1. The Bar recognized that "continued adherence to those policies and practices imposes an unfair and arbitrary professional disadvantage on those members of the [Bar] Association who are subjected to discrimination . . ." San Francisco Bar Ass'n Resolution (Adopted June 11, 1986).

California and Utah amended their codes of judicial conduct⁸ and the Judicial Conference of the United States amended the commentary to Canon 2 of its Code of Judicial Conduct to declare that it is

⁸ Cal. Code of Jud'l Conduct, Canon 2 C (Deering's Supp. 1987); Utah Code of Judicial Conduct, Canon 2, Utah Judicial Council Reference Book (1987).

"inappropriate" for members of the judiciary to hold membership in organizations which practice invidious discrimination on the basis of race, sex, religion or national origin.⁹ The New Jersey Supreme Court has taken similar action.¹⁰ Columbia University, the University of Minnesota and the University of Southern California are among the academic institutions which expressly bar the conduct of university business or activities at discriminatory facilities.¹¹

⁹ Commentary to Canon 2 of the United States Code of Judicial Conduct. Adopted by the United States Judicial Conference on Mar. 13, 1981.

¹⁰ Guidelines for Extra Judicial Activities and Report of [New Jersey] Supreme Court on Extra Judicial Activities, § IV (D)(1) (Oct. 1987) at 9.

¹¹ Columbia University, Resolution Concerning University Participation in Clubs with Discriminatory Admissions Policies (Adopted Jan. 23, 1981); Memorandum of President C. Peter McGrath, June 1984, University of Minnesota; USC Trans-

Among governmental entities, Philadelphia adopted legislation banning the city from awarding contracts to any company that pays for membership or expenses at such clubs and from reimbursing public officials for expenses incurred at such clubs. Philadelphia Code Ch. 17-400 and Sec. 20-307 (1980). New York City Mayor Edward I. Koch and New York State Governor Mario Cuomo have issued Executive Orders barring the conduct of official City and State business at such facilities.¹² The New York Court of Appeals amended the Rules of the Chief Judge to include a similar

cript (Dec. 2, 1985) at 2.

¹² Exec. Order No. 69, Mayor Edward I. Koch, "Prohibition of the Conduct of City Business at Private Clubs That Engage in Discriminatory Membership Practices," (Sept. 28, 1983); Exec. Order No. 17, Governor Mario M. Cuomo, "Establishing State Policy on Private Institutions Which Discriminate," (May 31, 1983).

prohibition for the Unified Court System.¹³

Nothing could better demonstrate the deep and widespread concern with the true implications for women and minorities of exclusion from business oriented "private" clubs than the response of municipalities and states across the country to New York City's enactment of Local Law 63. Numerous governmental entities, inspired by New York City's approach to this serious problem, have taken similar action in a variety of ways. Legislation patterned on New York's ordinance has been adopted in Buffalo, Los Angeles, San Francisco, Wilmington, and the District of Columbia.¹⁴ Similar legisla-

¹³ Rules of the Chief Judge, 22 NYCRR 20.21 (Adopted Nov. 24, 1980).

¹⁴ Buffalo, N.Y., Ordinance Amendment - New Article XXIII Added to Chapter VII - Discriminatory Practices Concerning Membership or Facilities (enacted Sept. 16, 1987) (100); Los Angeles, CA., Ordinance No. 162426, Adding Sec. 59 to Chapter IV of the Los Angeles Municipal Code (enacted May

tion is under consideration in Philadelphia¹⁵.

The Liquor Licensing Board for the City of Boston adopted a regulation barring liquor licenses to discriminatory business oriented clubs.¹⁶ The California Franchise Tax Board ruled that after Jan. 1, 1988 business expense tax deductions will not be

28, 1987); San Francisco, CA., article 33 (b) (Part 11) chapter VIII of the San Francisco Municipal Code (effective Dec. 17, 1987); Wilmington, DE, Ordinance No. 87-063, as amended (Sept. 30, 1987); District of Columbia Law 7-50, Amendment to Sec. 102(x) of the Human Rights Act of 1977, (D.C. Law 2-38; D.C. Code, Sec. 1-2502 [24]) (effective Dec. 10, 1977).

¹⁵ Bill No. 581, chapter 9-1100 of the Philadelphia Code (Introduced May 16, 1985).

¹⁶ Rule of the Boston Licensing Board on Membership in Clubs (Adopted July 21, 1987). Enforcement of this regulation has been stayed pending this Court's decision in the case at bar.

allowed for payments to discriminatory clubs.¹⁷

All these actions were taken after extensive debate on the policies and practices of purportedly "private" clubs and their business related discriminatory impact. The conclusions of the organizations, cities and states which reviewed the matter were clear. All these new policies embody "a recognition...of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." Roberts, 468 U.S. at 626.

¹⁷ Tit. 18, ch. 3, Subch. 2.5 and 3.5, Cal. Admin. Code, §§ 17201 and 24343. (Amended 1987).

C. LOCAL LAW 63 DOES NOT INFRINGE EITHER THE INTIMATE OR EXPRESSIVE FIRST AMENDMENT ASSOCIATIONAL RIGHTS OF MEMBERS OF BUSINESS RELATED CLUBS.

1. Enforcement of Local Law 63 Does Not Abridge Club Members' Freedom Of Intimate Association

Under the two-branched analysis of freedom of association discussed by this Court in Roberts, 468 U.S. 609 (1984) and Rotary, 481 U.S. ___, S.Ct. 1940 107, (1987) the constitutional guarantee afforded "intimate association" protects "the formation and preservation of certain kinds of highly personal relationships." Roberts, 468 U.S. at 618; Rotary, 481 U.S. at ___, 107 S.Ct. at 1945. See, e.g., Zablocki v. Redhail, 434 U.S. 374, (1978) (marriage); Carey v. Population Services Int'l, 431 U.S. 678 (1977) (childbirth); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (child rearing and education).

Significantly, this Court has consistently refused to consider as intimate those relationships that are removed from the core concept of the home as the province of constitutionally protected privacy. See, e.g., Runyon v. McCrary, 427 U.S. 160, (1976) (prohibiting racially discriminatory admissions policies of private school "does not represent governmental intrusion into the privacy of the home or a similarly intimate setting"); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (court dismissed associational freedom challenge to ordinance preventing six unrelated individuals from living together).

Determining whether an institution is so private as to warrant constitutional protection "entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum

from the most intimate to the most attenuated of personal attachments," and requires consideration of such factors as "size, purpose, selectivity and whether others are excluded from critical aspects of the relationship." Roberts, 468 U.S. at 620, Rotary, 481 U.S. at ___, 107 S.Ct. at 1946. Local Law 63 defines as "not . . . distinctly private" those clubs which by virtue of their size and the commercial activities conducted by members and nonmembers on club premises are deprived of any claims to intimate association of the kind this Court has traditionally protected.

With respect to size, Local Law 63 applies only to clubs with more than 400 members. In Roberts this Court characterized a membership of 400 as too large to foster the kind of intimate, personal relationship between members that is worthy

of constitutional protection. Roberts, 468 U.S. at 609.

With respect to purpose and the exclusion of outsiders from critical aspects of the relationship, Local Law 63 addresses the reality, readily apparent to readers of local and national newspapers and magazines, that many of the city's most prestigious "private" clubs, clubs which are members of appellant, are in fact centers for business activity of every possible kind, a point which appellant does not deny.¹⁸

¹⁸ It is interesting to note that appellant does not deny this point. For years many individual members of New York City's "private" clubs have asserted that the discrimination they practice in their clubs is as protected as the discrimination they practice at home, and attempted to deny, by minimizing or distinguishing the commercial conduct at these clubs, that activities in furtherance of trade or business are conducted there. See e.g., Topics: Witness, N.Y. Times, Oct. 29, 1984 at A22, col. 1, (quoting Theodore White's statement at Atheneum Publisher's 25th

Phillip Johnson, one of the country's leading architects, periodically convenes "architectural luminaries" for "stag dinners at the all male Century Association." Vogel, The Trend-Setting Traditionalism of Architect Robert A.M. Stern, N.Y. Times, Jan. 14, 1985, at 41, 47. Harvard presidents use the Century to interview faculty prospects, Ryback, Encounters at the Schloss, Harvard, Nov.-Dec. 1987, at

Anniversary party at the Century Club on October 24, 1984 that "The first book they signed up was mine ... and it was agreed to here in this club.") and Letter from Theodore H. White to the N.Y. Times, Business Has No Business at Century Club, Nov. 17, 1984 at A22, col. 4, (claiming that despite the above quoted remarks the discussion did not count as business because the actual contract was not signed at the club). See also, Schanberg, Some of Their Best Friends, N.Y. Times, Mar. 26, 1983, at A23, col. 4 (describing Association of the Bar of the City of New York forum regarding legislation challenged herein); Admit Women? No Deal, Letter from George W. Ball to the N.Y. Times, Jan. 14, 1983, at A18, col. 1, (claiming that no business is conducted at the Century Club.)

67, and book publishers use it to woo book club editors. Fitzgerald, Fun 15 Months of the Year, N.Y. Times, Book Review, Nov. 3, 1985, at 1.

In a particularly ironic instance, it was at the Century that the search committee for a new principal of Phillips Exeter Academy recently met with the school's board of trustees to insist on its choice of a woman for the post. Shumer, A Woman at Old Exeter, N.Y. Times, Oct. 11, 1987, at 98. The Century Club was also the site for Atheneum Publishers' 25th anniversary party, Night Full of Literary Parties Attracts Big Names, N.Y. Times, Oct. 25, 1984, at B1, col. 1, and would have been the site for the 1984 American Book Awards dinner had not objections to use of a sex-discriminatory facility caused its removal to the New York Public Library, Three Writers Win Book Awards, N.Y. Times, Nov.

16, 1984, at C32, col. 1.¹⁹ Night Full of Literary Parties Attracts Big Names, supra, also described a party for 350 at the Lotos Club on the same night celebrating the 50th anniversary of Partisan Review.

A landlord said of his memberships in the Union League, Yale and American Yacht Clubs that the clubs were "an essential part of my business." "I used the clubs. My business is sales. I have to meet people to transact business." Harlem

¹⁹ The business nature of many Century Club activities is also evident from the testimony offered by then New York State Bar Association President Henry G. Miller before the New York Task Force on Women in the Courts. Mr. Miller stated that until a particular incident caused the Executive Committee of the State Bar to realize that women's exclusion from business oriented clubs constituted a barrier to their full participation in the profession and propose a policy barring the conduct of official business at places which discriminate against women, the State Bar "had many meetings" at the Century Club. Testimony of Henry G. Miller before the New York Task Force on Women in the Courts, Nov. 19, 1985, at 55-56.

Housing Failure: Jailed Landlord Says He Lost to System, N.Y. Times, Mar. 24, 1984, at B25, col. 3. Ralph Lauren showed his 1984 fall collection at the Union League Club, Ralph: Get Dressed, New York Post, Apr. 30, 1984, at 6, col. 1. The Union League was also the site chosen by Hyatt Corporation Chairman Jay A. Pritzker for a meeting with Braniff Airline creditors to discuss a takeover proposal. Improved Braniff Aid Plan Reported, N.Y. Times, Apr. 1983, at 29, col. 1.

Despite CBS' company policy of nonsupport for discriminatory private clubs, see footnote 5, supra, the CBS board of directors met with Lawrence Tisch at the Links Club to discuss his purchase of CBS stock. Diamond, The Tisch is in the Mail, N.Y., Sept. 1, 1986, at 36. The president and chief operating officer of American Airlines met with securities analysts at

the Union Club. American Air's Low-Cost Program, N.Y. Times, Mar. 1, 1984, at D1, col. 2. Clearly, Gottlieb, Steen & Hamilton held its 1983 semi-annual dinner at the Harmonie Club, Legal Couples, Balancing Act, Legal Times of N.Y., Nov. 21, 1983, at 1, col. 1.²⁰

On the first Monday of each month the Tax Forum, a group of New York's leading tax attorneys, meets at the University Club to explore current taxation problems and deliver papers which are subsequently published in professional journals. Wise, A Who's Who of Tax Lawyers, N.Y.L.J., June 20, 1983, at 1, col. 1. The University Club was also the site for a public forum on apartheid and disinvestment convened by the Manhattan Institute for Policy Re-

²⁰ The Harmonie Club has recently changed its rules and admitted women to membership in conformance with Local Law 63.

search. Apartheid Discussion at an All-Male Club, N.Y. Times, Nov. 11, 1985, at A18, col. 3. In a 1980 letter to its membership, the University Club's president advised that in 1979 the club has derived \$1,072,200 from business entertaining and stated that this figure represented a "significant percentage" of the club's total revenue. Francke, Club Mad, N.Y., June 2, 1980, at 29, 30.²¹

These are but a few examples of the extensive business activities conducted at so-called "private" clubs in New York City.²² One can begin to gauge the full

²¹ The University Club has also recently changed its rules and admitted women to membership.

²² Amici have cited these particular examples of business at New York City's "private" clubs because the public reporting of these events makes clear that the commercial nature of much of the activity at these clubs is widely known. The New York City Commission on Human Rights documented numerous other instances of

extent of this activity from the letter of the former University Club president to its membership cited above:

A recent analysis of dues and expense payment showed that nearly 40% of receipts were paid by checks drawn on business accounts; this is only a part of the total, since many persons pay on their own account and then obtain reimbursement from employers. It may be assumed conservatively that employers are the source of well over 50% of our dues and fees.

Letter of J. Wilson Newman, dated March 31, 1980.²³

That clubs are an integral part of business life throughout the country is evident from numerous sources. In 1980 the

business events at "private" clubs in the complaints initiated by the Commission against the Century Association, Union League and University Club (Jan. 31, 1986) and the New York Athletic Club (Mar. 19, 1987).

²³ This letter is appended to the 1980 Statement on Behalf of the New York City Commission on the Status of Women cited at 24 infra, which has been lodged with the Court.

National Club Association estimated that 37% of city clubs' income and 26% of country clubs' income came from company paid memberships, The All-Male Club: Threatened on all Sides, supra, n.1 at 90, and that half of the approximately 300,000 federal contractors paid or reimbursed certain dues or expenses incurred by their employees at private clubs, Comments of the Nat'l Club Ass'n re: Regulations Proposed by the Dep't. of Labor, Office of Federal Contract Compliance Programs, Dealing With Payments by Federal Contractors to Private Organizations (Mar. 24, 1980). Tax deduction of members' dues and club-related expenses in private clubs is pervasive. In 1986 a U.S. News and World Report "Tax Tips" column listed as an item that may be deducted in whole or in part "Dues to a

luncheon club used for business meetings."²⁴ When Record Keeping Pays Off, U.S. News and World Report, Mar. 17, 1986, at BC-218. The Wall Street Journal counseled executives to seek club memberships as an executive perquisite, Executive Dreams: What Benefits to Request Under New Tax Law, Wall St. J., Oct. 28, 1986 at 37, col. 3. One survey found that 58% of the banks and 53% of the savings and loan

²⁴ Since each deduction constitutes a representation to the government that club activities are business-related, such practices contradict any argument that clubs are purely social organizations. The federal Internal Revenue Code provides that only "the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business" may be deducted from income taxes. 26 U.S.C. § 162. For the deduction to be allowed for a club-related expense, federal tax regulations further require that a club be used for business purposes at least 50 percent of the time. Treas. Reg. § 1.274-2(e)(4)(iii) (1982). Treating club-related expenses as a business deduction is thus prima facie evidence that membership is for a business purpose rather than an intimate association.

associations contacted regularly paid membership dues in private organizations for their executives. Burns, supra n.1, 18 Harv. C.R.-C.L. L. Rev. at 329 n.22. A recent comprehensive survey of executive perquisites revealed substantial percentages of the seven industry groups studied paying for luncheon and supper club dues for one or more management levels. Executive Compensation Services, Inc., Executive Perquisites Report 1986/87 66-69 (1986). Many law firms reimburse lawyers for dues and even those that do not repay client entertainment charges spent at such clubs. "Male" Clubs: Bar Leaders are Members, supra, n.4 at 1.

In considering where "on the spectrum from the most intimate to the most attenuated of personal attachments," a club falls and "whether others are excluded from critical aspects of the relationship"

Roberts, 468 U.S. at 620; Rotary, 481 U.S. at ___, 107 S.Ct. at 1946, business activity on club premises must be taken into account. Appellant places great weight on U.S. Power Squadrons v. State Human Rights Appeal Board 59 N.Y.2d 410, 452 N.E.2d 1199, 465 N.Y.S.2d 871 (1983) in which the New York Court of Appeals enunciated factors to be used in determining whether a club is "distinctly private", and presses its members' selectivity in membership choices. But however its members are chosen, when those members regularly use their clubs as extensions of their businesses, the clubs forfeit any claim to a right of intimate association.

As the New York Court of Appeals stated in rejecting appellant's challenge to the legislation here at issue:

[Local 63] merely spells out objectively in more concrete terms the circumstances when a club, because of

its large size, "public nature," and volume of business-related activities will be deemed to have lost the essential characteristic of privateness i.e., selectivity. It is not unreasonable to determine that a large club which receives substantial business-related income from nonmembers cannot be selective in its membership and use of its facilities.

New York State Club Association, Inc. v. City of New York 69 N.Y.2d 211, 221 (1987).

Local Law 63 does not eliminate private clubs. Rather it defines a previously undefined term in the New York City Human Rights Law, "distinctly private", to differentiate between those clubs which function as intimate, social organizations and those which function as extensions of the boardroom and the business office. Clubs which are truly private are not affected by Local Law 63. Clubs which are not currently "distinctly private" but wish to avoid Local Law 63's coverage can become so by genuinely pro-

hibiting business activity on their premises.

2. Local Law 63 Does Not Violate Club Members' Right Of Expressive Association. Any Infringement Of Club Members' Freedom Of Expressive Association Is Outweighed By The Compelling State Interest In Ensuring Nondiscriminatory Access To Commercial Opportunities.

The right to associate for expressive purposes, the second branch of the freedom of association analysis, is grounded in protecting the interests of organizations whose purpose for associating is "the advancement of beliefs and ideas." NAACP v. Alabama 357 U.S. 449, 460 (1958). The impact of Local Law 63 is confined to clubs which, by virtue of the business related activities carried on there, demonstrate a commercial rather than an expressive purpose. See, e.g., Hishon v. King and Spaulding, 467 U.S. 69 (1984); Ohralik v. Ohio State Bar Association, 436 U.S. 447,

459 (1978). When a club "enters the market place of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the market place of ideas." Roberts, 468 U.S. at 636, (O'Connor, J., concurring).

Members' social preference to perpetuate the exclusion of women and minorities from business oriented clubs is not sufficient to invoke First Amendment protection. As the New York Court of Appeals observed, "[A]lthough plaintiff's constituent members have a right to free speech and to association, they lack the right to practice invidious discrimination against women and minorities in the distribution of important business advantages and privileges (see, Roberts v. United States Jaycees 468 U.S. at p. [sic] 628, 104 S.Ct. at 3255 supra; Runyon v. McCrary, 427 U.S.

160, 175-176, 96 S.Ct. 2586, 2596-97, 49 L.Ed. 2d 415; Norwood v. Harrison, 413 U.S. 455, 469, 93 S.Ct. 2804, 2812, 37 L.Ed. 2d 723)." New York State Club Association, Inc. v. City of New York, 69 N.Y.2d. at 224. (Emphasis in original.)

— If there is any infringement of NYSCA's member's right of expressive association, "that infringement is justified because it serves the State's compelling interest in eliminating discrimination..." Rotary, 481 U.S. at __, 107 S.Ct. at 1947. Local Law 63 does not require clubs to abandon their membership criteria or alter their activities, except insofar as necessary to eliminate invidious discrimination in the choice of members and members' and guests use of facilities. The law requires only that women and minorities be given the same opportunity as majority group men to join and benefit from the

commercial services and advantages that membership in business oriented clubs provides. As such, Local Law 63, "'responds precisely to the substantive problem which legitimately concerns' the State and abridges no more speech or associational freedom than is necessary to accomplish that purpose." Roberts, 468 U.S. at 629 (quoting City Council v. Taxpayers for Vincent, 466 U.S. 789, 819 (1984)).

V.

CONCLUSION

Local Law 63 is a constitutionally valid expression of New York City's compelling interest in eliminating discrimination in the availability of commercial opportunities and in no way infringes the right to either intimate or expressive free association. Amici therefore submit that this Court should affirm the decision below.

Respectfully submitted,

Lynn Hecht Schafran
Sarah E. Burns
NOW Legal Defense and
Education Fund
99 Hudson Street
New York, NY 10013
Telephone: (212) 925-6635

Attorneys for Amici Curiae

Of Counsel:

Judith I. Avner
54 Fernbank Ave.
Delmar, NY 12054
Telephone:
(518) 439-7752

Beverly Gross
525 West End Ave.
New York, NY 10024
Telephone:
(212) 877-8109

APPENDIX

APPENDIX

AMICI'S STATEMENTS OF INTEREST

American Association of University Women (AAUW), a national organization of over 150,000 college-educated women and men, is strongly committed to achieving legal, social, educational and economic equity for women. For more than a century AAUW has worked toward those goals by responsible participation in public policy issues at local, state, national and international levels. In addition, AAUW has promoted the attainment of higher education for women in traditional and non-traditional fields by awarding fellowships totalling one million dollars annually. Many AAUW members and former fellows are distinguished professional women whose exclusion from business-oriented private clubs has had a discriminatory impact upon

their careers and lives. AAUW opposes all forms of discrimination. Therefore AAUW has a strong interest in the outcome of this case.

American Jewish Committee ("AJC") is an organization of some 50,000 members which was founded in 1906 to protect the civil and religious rights of Jews. AJC has always believed that the civil and religious rights of Jews cannot be secure unless the civil and religious rights of all Americans are equally secure. AJC, therefore, is resolutely opposed to discrimination based on sex, race, religion or national origin. Our opposition to discrimination is not limited to matters of employment, housing and education, though it surely includes all of those. It extends also to discrimination by so-called private clubs, almost all of which are very much business-related. AJC considers club

discrimination to be among the last major bastions of bigotry in our country, which must be eradicated. AJC has appeared before this Court as an amicus curiae in Roberts v. U.S. Jaycees, supra and Rotary International v. Rotary Club of Duarte, supra. That is why AJC now joins in this brief in the instant case.

American Jewish Congress is an organization of American Jews founded in 1918 dedicated to the preservation of the security and constitutional rights of Jews in America. It brings to the issue raised in this appeal the perspective of a national organization, selective in membership, with a particularist agenda dictated by that selectivity, yet one that is firmly committed to opposing racial, religious and sexual distinction and assuring all citizens equal access to truly public facilities.

At the same time, American Jewish Congress is particularly sensitive to the need for protecting rights of intimate association and the concomittant right of expressive association to limit membership in ways which preserve and advance bona fide, ideological, religious, cultural or ethnic values and practices. We believe, however, that no true rights of expressive association are implicated by Local Law 63.

Americans for Democratic Action (ADA), is a progressive, independent political organization, is a national coalition of civil rights and feminist leaders, academicians, business people and trade unionists, grass roots activists, elected officials, church leaders, professionals, members of Congress and many others. ADA is dedicated to the achievement of freedom, equality of opportunity, economic security and peace

for all people through education and political action.

Association of Black Women Attorneys of New York is an organization of approximately 250 women committed to the advancement of black women in the legal community as well as the profession. Our members are well aware that many "private" clubs in the city are centers for business activities and discussions, and serve as "extensions" of the office where business transactions are often initiated and concluded and important contacts are made. In addition, many of our members are invited to be present at these business events and are uncomfortable and inconvenienced at these "private" clubs, where women and minorities are officially excluded and/or denied membership and equal treatment. We are concerned about the impact of this situation upon our membership's professional

careers and ability to function effectively as business partners. We support Local Law 63 as a necessary measure to remedy this discrimination and appeared as an amicus in the case at bar before the New York Court of Appeals. New York State Club Association v. City of New York, supra.

California Women Lawyers ("CWL") is a statewide bar association representing the interests of the approximately 15,000 women lawyers in the State of California. It has both individual members and 24 local affiliates throughout the state. The membership of CWL includes both male and female lawyers, judges and law students, all of whom are concerned with the legal rights and equal treatment of women. The ability of women to compete effectively in the marketplace has been and is being hindered by their exclusion from discriminatory private clubs and organizations that

foster the business goals of their all male, mostly all-white, membership. For this reason CWL took an active role in urging the California State Bar and the California Judicial Council to adopt a resolution and an amendment to the code of ethics, respectively, discouraging participation in private clubs which discriminate on the basis of sex, race or religion and in urging the adoption by the cities of San Francisco and Los Angeles of regulations similar to the one at issue in this case. CWL appeared before this Court as amicus curiae in Board of Directors of Rotary Int. v. Rotary Club, supra.

Connecticut Women's Educational and Legal Fund, Inc. is a non-profit organization working for women's legal rights through litigation, public policy research, community education, and information and referral. It has over 400 members and

serves over 3,000 individuals a year. CWEALF has learned from the many women who call its organization with complaints of sex discrimination that it is as important to have equal access to the networks, information and support provided by activities and organizations outside of work as it is to receive equal treatment on the job. CWEALF joins this case because it supports Local Law 63 and other public accommodations statutes which prohibit discrimination against women and minorities in those clubs and activities which are a part of the commerce and civic life of our communities. CWEALF appeared before this court as amicus curiae in Roberts v. U.S Jaycees, supra and Rotary Int. v. Rotary Club, supra.

Equal Rights Advocates, Inc. is a San Francisco based, public interest legal and educational corporation specializing in the

area of sex discrimination. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. Equal Rights Advocates, Inc. has been particularly concerned with gender equality in other aspects of society. ERA appeared before this court as amicus curiae in Roberts v. U.S. Jaycees, supra and Rotary International v. Rotary Club of Duarte, supra.

Financial Women's Association of New York, Inc. is a non-profit organization composed of nearly 600 women and men members in the financial industries or in financial positions in other industries. FWA is a 31 year-old organization; it attracts speakers from the highest levels of business and government and has a full program year. In addition, it gives scholarships to MBA students, supports a high school mentoring program and every

summer runs a college intern program. FWA is concerned that its members are denied access to private club where significant business decisions and activities are taking place. FWA supports Local Law 63 as a necessary measure to remedy this discrimination and appeared as amicus curiae in the case at bar before the New York Court of Appeals. New York State Club Association v. City of New York, supra.

Hawaii Women Lawyers (HWL), an organization of approximately 200 members, was founded in 1976 for the purpose of furthering the goals of women attorneys in Hawaii. HWL was incorporated in 1982. The members have been involved in many projects which aid women lawyers and women in the community in general. HWL has always viewed "private" clubs as discriminatory toward women and minorities. HWL members played key roles in opening the membership of the

Honolulu Pacific Club to women. HWL supports Local Law 63 as a necessary measure to remedy the discrimination at business-related "private" clubs.

Hawaii Women Lawyers Foundation is a professional organization of women and men attorneys and others. One of its main purposes is to advance the status of women in the community. Members have been involved in many projects which aid women lawyers and women in the community in general.

Foundation members are aware that many law firms and businesses sponsor membership for their key executives, pay for their club charges including meal bills and annual dues, and regularly use club facilities for entertaining clients and conducting meetings.

The HWL Foundation supports the New York city Local Law 63 as a necessary

measure to ensure women and minorities access to important business opportunities.

Metropolitan Woman's Bar Association (MWBA) is an organization of approximately 350 men and women mainly involved in the trial bar in the metropolitan area of the City of New York and dedicated to the purpose of advancing women in the legal profession. Our women members are affected by exclusion from business oriented clubs in that this is a limitation on their access to business opportunities, business contacts and the power structures of the legal profession. MWBA supports Local Law 63 as a first step in remedying this situation and appeared as amicus curiae in the case at bar before the New York Court of Appeals. New York State Club Association v. City of New York, supra.

The NAACP Legal Defense and Education Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Black citizens in securing their constitutional rights. In numerous cases before this Court, it has challenged discrimination against Blacks under the Constitution, and has also urged the full enforcement of the Civil Rights Act of 1964 to remedy the causes and effects of such prohibited and invidious discrimination.

Amicus has several interests in the outcome of the case. The NAACP Legal Defense Fund is committed to the elimination of all vestiges of discrimination on the basis of race and sex, and seeks to enforce the right of Blacks and women to access to opportunities from which they have so long been excluded. It recognizes the legal right of Blacks and women to gain

entry into all aspects of their professional community. Amicus is acutely aware of the gross underrepresentation of Blacks in the professional arena, resulting from historical and persistent patterns of racial discrimination. An affirmance of the New York State Court of Appeals would notify private clubs who discriminate that they are not immune from the scrutiny under the laws prohibiting such discrimination.

National Coalition of Labor Union Women (CLUW) is an organization of 20,000 members in 38 states. New York CLUW is an organization of approximately 600 men and women committed to the legal, economic and social advancement of women in the workforce. CLUW members are well aware that many "private" clubs in the city are centers for business activities and discussions, and serve as "extensions" of the office where business transactions are

often initiated and concluded and important contacts are made. In addition, many members are invited to be present at these events and are uncomfortable and inconvenienced at these "private clubs," where women and minorities are officially excluded and/or denied membership and equal treatment. CLUW is concerned about the impact of this situation upon its membership's professional careers and ability to function effectively. CLUW appeared before this Court as amicus curiae in Roberts v. U.S. Jaycees, supra and Rotary International v. Rotary Club of Duarte, supra.

National Conference of Women's Bar Associations (NCWBA) is comprised of state and local women's bar groups across the nation, representing more than 10,000 women lawyers. Continued denial of access to the business contacts and amenities of leading discriminatory private clubs seriously

impairs the ability of these women attorneys to develop their client bases and advance their legal careers. Therefore, opening discriminatory clubs to women members has been one of NCWBA's priority goals since its founding in 1981.

National Organization for Women ("NOW") is a national membership organization of 150,000 women and men in over 750 chapters throughout the country dedicated to assuring equal economic, social and political opportunity for all women. Since its founding in 1967, NOW has been the largest feminist membership organization dedicated to combatting sex discrimination and removing barriers to women's full participation in all aspects of American society. NOW participated as amicus before this court in Roberts v. U.S. Jaycees, supra and Rotary International v. Rotary Club of Duarte, supra. NOW recognizes the

importance of equal access for women to clubs which facilitate entry into a network of influential business and community leaders.

National Organization for Women Legal Defense and Education Fund (NOW LDEF) is a not-for-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women.

Because the exclusion of women from clubs and organizations which significantly impact the business and civic life of the community affects far more women than is generally supposed, this is an issue with which NOW LDEF has been involved for many years. NOW LDEF worked closely with the Minnesota Attorney General over a five year

period and filed several amicus briefs including one before this Court in Roberts v. United States Jaycees, supra. NOW LDEF also appeared before this court as amicus curiae in Rotary International v. Rotary Club of Duarte, supra. With respect to the case at bar NOW LDEF appeared as amicus curiae twice before the New York Appellate Division and before the New York of Appeals. The New York State Club Association v. City of New York, supra.

National Organization for Women-New York City (NOW-NYC) is a membership organization of 3,500 women and men committed to assuring economic, social and political opportunity for all women. NOW-NYC is the largest organization in the city dedicated to combatting sex discrimination and removing barriers to women's full participation in all aspects of American society. NOW-NYC has been an active

supporter of Local Law 63, the legislation challenged herein, since its introduction in the New York City Council in 1980, and testified in support of the predecessor to this legislation, Intro. 513, at the City Council's July, 1980 hearings. NOW-NYC was an amicus in the case at bar before the New York Court of Appeals. New York State Club Association v. City of New York, supra.

National Organization for Women - New York State (NOW-NYS) is a membership organization of 20,000 women and men in 34 chapters throughout the state committed to assuring equal economic, social and political opportunity for all women. NOW-NYS is the largest membership organization in the state dedicated to combatting sex discrimination and removing barriers to full participation of women in all aspects of American Society. Exclusion of women from clubs and organizations important to

the community is a long standing concern of NOW-NYS, which participated as amicus curiae in the case at bar before the New York Court of Appeals. New York State Clubs Association v. City of New York, supra.

New York City Commission on the Status of Women was established by Mayoral Executive Order in 1975 to advise the Mayor of New York City on issues affecting the City's 3.5 million women, to support and promote the rights of women in the private and public sectors of New York City and to advocate change to promote women's equality. In 1980 and 1983 the Commission offered extensive testimony before the City Council in support of Intro. 513, now Local Law 63, the statute challenged herein. This testimony addressed the extent of business activity at so-called "private" clubs, the exclusion of women from business

events there or their humiliation while in attendance (e.g. being directed not to sit in the lobby) and the importance of the proposed legislation.

In the years since Local Law 63 was originally introduced and since its enactment, whenever Commission officers or members have discussed this legislation at public fora, it has consistently evoked a high degree of positive response from the audience, with many audience members subsequently advising the speaker that they are personally aware of business conducted at the city's "private" clubs because they had to attend meetings there in the course of their work, or, in some cases, have actually scheduled such meetings themselves for their employer organizations, unaware of the club's discriminatory membership policies. The Commission was an amicus in the case at bar before the New York Court

of Appeals. New York State Club Association v. City of New York, supra.

New York Coalition of 100 Black Women is a not-for-profit organization of approximately 600 members organized under the laws of the State of New York. Its purpose is to act as an advocacy and educational organization of behalf of Black women and their families. Among the Coalition's goal is the advancement of Black women in business and community life. Our members are aware that substantial business is conducted at many of New York City's "private" clubs. The exclusion of women and minorities from membership in these clubs and the disparate treatment of women when they are guests at business functions at these clubs is a barrier to equal business opportunity and advancement. Local Law 63 is a necessary measure to remedy this discrimination. The Coalition

appeared as an amicus in the case at bar before the New York Court of Appeals. New York State Club Association v. City of New York, supra.

New York Women in Communications, Inc., is an organization of approximately 1,000 men and women committed to the advancement of women in the various areas of the communications industry, including advertising, newspapers, magazines, broadcasting, public relations, publishing, and film. Our members are well aware that many "private clubs in the city are centers for business activities and discussions, and serve as "extensions" of the office where business transactions are often initiated and concluded and important contacts are made. In addition, many of our members are invited to be present at these business events and are uncomfortable and inconvenienced at these private clubs,

where women and minorities are officially excluded and/or denied membership and equal treatment. We are concerned about the impact of this situation upon our membership's professional careers and ability to function effectively as business partners. We support Local Law 63 as a necessary measure to remedy this discrimination and appeared as an amicus curiae in the case at bar before the New York Court of Appeals. New York State Club Association v. City of New York, supra.

New York Women's Bar Association. The New York Women's Bar Association (NYWBA) is a non-profit membership organization of approximately 750 female and male attorneys, law graduates and law students committed to the advancement of women's rights. NYWBA cooperates with and aids and supports organizations and causes which advance the status and progress of women in

society. NYWBA's primary goals are full access by women to equal opportunity in business, commerce, the professions and the community, to promote reforms in the law, to facilitate the administration of justice and the attainment of equality and justice under the law. NYWBA appeared as an amicus curiae in the case at bar before the New York Court of Appeals. New York State Club Association v. City of New York, supra.

Northwest Women's Law Center ("Law Center") is a non-profit, membership-supported organization based in Seattle, Washington, that seeks to promote the rights of women through law. The Law Center conducts educational programs as well as an information and referral service to advise women in the Pacific Northwest of their legal rights. It also sponsors litigation working toward the total elimination of sex discrimination, including the eradication

of employment discrimination and of social and legal barriers that deny women full participation in the business and professional world. The Law Center appeared before this Court as amicus curiae in two previous cases involving issues similar to those in the case at bar. Roberts v. U.S. Jaycees, supra, and Board of Directors of Rotary International v. Rotary Club of Duarte, supra.

San Francisco Women Lawyers Alliance (SFWLA) is a bar association comprised of women lawyers and other legal professionals practicing in the San Francisco bay area. The organization has filed a number of amicus briefs and lobbied for state and local legislation affecting economic and employment opportunities for women, including participating in regulatory proceedings to prevent private clubs that discriminate from receiving state liquor

licenses and tax benefits. Recently, the Alliance assumed a leadership role in persuading both the Bar Association of San Francisco and the California State Bar Board of Governors to adopt resolutions denouncing the discriminatory membership policies of private clubs. In addition, the organization has helped secure local legislation similar to the New York City Human Rights law that is currently under review. SFWLA appeared as an amicus before this Court in Board of Directors of Rotary International v. Rotary Club of Duarte, supra.

Women and Foundations/Corporate Philanthropy (WAF/CP) is a not-for-profit organization incorporated within the State of New York whose purposes are to increase the amount of money for programs that benefit women and girls and to enhance the status of women as decision-makers within

private philanthropy. Its 700 female and male members are grantmakers, staff, trustees and individual donors and persons from organizations which serve the field of philanthropy. It is no secret that certain kinds of philanthropic work, e.g. trustee meetings, high level program presentations and policy luncheons, are often conducted in those important clubs founded originally by wealthy individuals (who make much of philanthropy possible) but now sustained largely by business dollars. Because WAF/CP's interest in ending this inequity is such that in 1981 it commissioned and published a paper, by Lynn Hecht Schafran, WELCOME TO THE CLUB! (No Women Need Apply): Withdrawing Financial Support from Clubs that Discriminate Against Women which went through two printings, sold approximately 2,500 copies, and was the impetus for the adoption of policies by the Council on

Foundations, similar organizations and foundations barring the use of discriminatory clubs for business functions. WAF/CP supports Local 63 as a necessary measure to remedy this discrimination and appeared as a amicus in the case at bar before the New York Court of Appeals. New York State Clubs Association v. City of New York, supra.

Women's Action Alliance is a national organization, founded in 1971, committed to furthering the goal of full equality for all women. The Alliance works toward this end by providing educational programs and services that assist women and women's organizations to accomplish their goals. The Alliance recognizes the importance of women's access to "private clubs". These clubs serves as important vehicles for women and men alike as areas for networking, informal negotiations, and business

transactions. Barring women from these selective clubs prevents them from engaging in important transactions and inhibits their ability to function fully as businesswomen. The Alliance supports Local Law 63 as a necessary measure to remedy this discrimination and appeared as amicus curiae in the case at bar before the New York Court of Appeals. New York State Club Association v. City of New York, supra.

Women's Bar Association of the District of Columbia (WBA), founded in 1917, is a non-profit organization of approximately 1,600 attorneys with membership open to members of the legal profession regardless of sex, race, creed, religion or national origin. The WBA was organized to maintain the honor and integrity of the legal profession, to promote the administration of justice, and to promote the advancement of women

attorneys. Because the WBA is committed to these goals, we are concerned that membership in such "private" clubs in the District of Columbia, New York City and other metropolitan areas not be closed to women attorneys and judges since these clubs are often centers of business activity and discussions. Contacts made there result in clients and bench appointments. To exclude women lawyers from such a source of professional development has a negative impact upon the careers of many of our members. This organization has supported a similar ordinance recently passed by the District of Columbia City Council outlawing discrimination in business-related "private" clubs.

Women's Bar Association of the State of New York (WBASNY) is a state-wide membership organization of more than 2,500 female and male attorneys, law graduates

and law students. WBASNY is concerned not only with the professional status of women attorneys, but also with the protection of the rights of all women in every field of human endeavor. It is committed to the removal of barriers which prevent women from achieving their full potential as equal participants in all facets of our society. In pursuit of this goal, WBASNY sought and was granted amicus status by the Court in Hishon v. King and Spaulding, 467 U.S. 69 (1984) and in Meritor Savings Bank, F.S.B. v. Vinson. 477 U.S. ___, 106 S.Ct. 2399 (1986).

This organization has consistently opposed the exclusion of women from membership in clubs and organizations which do not function simply as social groups but which solicit, and are largely supported by, the revenue from business meetings and functions. Most such organizations

tolerate the presence of women at some functions (frequently held in special rooms set aside for that purpose). However, the conduct of business in such a milieu denies women equal status with their male colleagues who retain power to decide whether women will be given even the opportunity to participate in decision making. For these reasons, WBASNY appeared as amicus curiae in the case at bar before the Court of Appeals of the State of New York. New York State Club Association v. City of New York, supra.

The Women's Equity Action League (WEAL) is a national non-profit membership organization specializing in economic issues affecting women and sponsors research, education projects, litigation and legislative advocacy. WEAL is committed to the full and effective enforcement of anti-discrimination laws at both the

federal and state levels, to assure that all economic opportunities are available to women as well as men. WEAL participated as amicus curiae before this Court in Roberts v. U.S. Jaycees, supra and Board of Directors of Rotary International v. Rotary of Duarte, supra.

Women's Law Project ("WLP") is a non-profit feminist law firm dedicated to eliminating sex discrimination through litigation and public education. Since its founding in 1973, WLP has been concerned with institutional barriers to the advancement of women at all levels of participation in society. WLP has represented women seeking admission to all male educational institutions and community organizations and strongly believes that participation in such organizations is fundamental to the ability of women to compete equally in business and community

life. WLP appeared before this Court as amicus curiae in Roberts v. Jaycees, supra and Rotary International v. Rotary Club of Duarte, supra.

Women's Legal Defense Fund ("WLDF") is a non-profit, tax exempt membership organization, founded in 1971 to provide pro bono legal assistance to women who have been discriminated against on the basis of sex. The fund devotes a major portion of its resources to combatting sex discrimination in employment, through litigation of significant employment discrimination cases, operation of an employment discrimination counselling program, and public education. WLDF's experience and knowledge -- gained from its members who, as professionals, are disadvantaged by discriminatory membership policies and from its clients who are similarly disadvantaged by exclusion from community and business

organizations -- have demonstrated that such exclusionary policies result in a diminution of employment opportunities. WLDF appeared before this Court as amicus curiae in Roberts v. Jaycees, supra and Rotary International v. Rotary Club of Duarte, supra.

AMICUS CURIAE

BRIEF

22

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

NEW YORK STATE CLUB ASSOCIATION, INC.,
v. *Appellant,*

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF
NEW YORK, THE CITY HUMAN RIGHTS COMMISSION
and THE MEMBERS OF THE CITY HUMAN RIGHTS COM-
MISSION,
Appellees.

On Appeal from the New York State Court of Appeals

BRIEF OF
THE AMERICAN BAR ASSOCIATION
AS *AMICUS CURIAE*
IN SUPPORT OF APPELLEES

ROBERT MACCRATE
President
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

Counsel of Record

MICHAEL J. MADIGAN, P.C.

STARK RITCHIE

MICHELLE L. GILBERT

C. FAIRLEY SPILLMAN

JOHN M. COOK

Attorneys for the

*American Bar Association as
Amicus Curiae*

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1836

NEW YORK STATE CLUB ASSOCIATION, INC.,
v. *Appellant*,

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF
NEW YORK, THE CITY HUMAN RIGHTS COMMISSION
and THE MEMBERS OF THE CITY HUMAN RIGHTS COM-
MISSION,
Appellees.

On Appeal from the New York State Court of Appeals

BRIEF OF
THE AMERICAN BAR ASSOCIATION
AS *AMICUS CURIAE*
IN SUPPORT OF APPELLEES

INTEREST OF THE *AMICUS CURIAE* *

Amicus curiae, the American Bar Association ("ABA"), is the leading voluntary, national membership organization of the legal profession. Its more than 343,000 members come from each state and territory and the District of Columbia. The ABA's constituency includes private lawyers, government lawyers, trial and appellate judges from the state and federal courts, legislators, law

* The parties' letters of consent have been lodged with the Clerk pursuant to Supreme Court Rule 36.2.

professors, law students and a number of "non-lawyer" associates in allied fields. Over recent years, the ABA's membership has included a significantly higher proportion of women and minorities as more members of these groups enter the legal profession.

The ABA has had a longstanding interest in civil rights, including equal access to public accommodations. Moreover, because it is a professional organization, the ABA has recognized the importance of equal access to business clubs for the purpose of business and professional development. Consistent with this interest and to protect its own minority and female members, whose business and professional development is enhanced by having equal access to "private" business clubs, the ABA adopted a policy barring the holding of any ABA function in places "where there is a reasonable doubt that the actual club membership does not include women, men and members of minority groups irrespective of who, in fact, pays for such a function. . . ." ¹ This policy has been implemented without any adverse effects or inconvenience to the ABA or its members.

For similar reasons, in 1984, the ABA adopted a resolution incorporating the following language into the Commentary of the Model Code of Judicial Conduct, Canon 2: "It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin." By this resolution, the ABA sought to prevent the potential diminishment of mutual respect and collegiality among members of the judiciary and members of the bar as the numbers of women and minorities in both professions increase. Such discriminatory membership also could wrongly suggest that the members of those excluded groups are inferior and thereby offend all members of the public who deplore invidious discrimination.

¹ ABA Policy and Procedures Handbook 97 (1986-87).

The ABA expressly stated its unequivocal opposition to discrimination by "private" business clubs in a resolution adopted at the ABA's August 1983 Annual Meeting in recommending an amendment to Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a. The resolution reads as follows:

BE IT RESOLVED, that the American Bar Association endorses amendments to Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (which prohibits discrimination in public accommodations on the basis of race, color, religion, or national origin) * to:

- (1) include in the definition of the term "public accommodation" any private club or other establishment which derives a substantial portion of its income from business sources;
- (2) provide an adequate objective standard by which to measure "a substantial portion of income from business sources."

* and which the House in 1980 urged be amended to also prohibit discrimination on the basis of sex.²

This resolution had been adopted and proposed to the ABA by the New York State Bar Association. Before the ABA, the resolution was also co-sponsored by the Association of the Bar of the City of New York, by the State Bars of Michigan, California, Massachusetts, Minnesota, and Vermont, by the Detroit, Philadelphia, and Oakland County (Michigan) Bar Associations, and by the ABA Section of Individual Rights and Responsibilities, the ABA Litigation Section, and the ABA Young Lawyers Division.

² This footnote, which was included in the 1983 resolution, refers to a resolution passed at the ABA's 1980 Annual Meeting supporting an amendment to Title II of the Civil Rights Act "to prohibit discrimination on the basis of sex in public accommodations." That resolution serves as another example of the ABA's commitment to end discrimination of all types in public accommodations.

Finally, consistent with the ABA's firmly established philosophy of encouraging equal access to exclusive business clubs, the ABA testified before the General Welfare Committee of the New York City Council in support of the bill that is in substance now before this Court.³ Local Law 63, as enacted, is consistent with the ABA's longstanding concern about discrimination in private clubs and the ABA's 1983 resolution on this issue.

The ABA, therefore, submits this brief to demonstrate that discrimination by many "private" business clubs is an issue of compelling interest to governing bodies and to demonstrate that the New York City Council has addressed this serious issue appropriately in Local Law 63.⁴

SUMMARY OF ARGUMENT

To guarantee equal access to the marketplace for women and minorities, so-called "private" clubs that are in fact centers of commercial activity must be subject to anti-discrimination laws such as New York City's Local Law 63. The pervasive business activity occurring at such clubs has been documented thoroughly by various scholars and governmental bodies. Indeed, the business purpose of many club activities is acknowledged routinely by club members.

³ The ABA testified in support of "Introductory Number 513," the predecessor bill to "Introductory Number 513-A," which upon enactment was designated Local Law 63 of 1984. Introductory Number 513 would have prohibited discrimination by clubs that have more than 100 members, that provide regular meal service and that regularly receive payment for dues, fees and other services "directly or indirectly from or on behalf of a non-member for the furtherance of trade or business." Local Law 63 is even less encompassing than Introductory Number 513 since it restricts the application of New York's anti-discrimination laws to those clubs that have more than 400 members, rather than only 100 members.

⁴ The ABA takes no position on the appellant's equal protection challenge to the City Council's decision to exempt benevolent and religious clubs from the Local Law.

The harm to the professional advancement of women and minorities caused by exclusion from this critical aspect of marketplace activity is just as widely recognized. Women and minorities excluded by discriminatory policies are denied opportunities for contacts and professional betterment available in "private" business clubs. These invidious effects are exacerbated by the clear message to the larger community that the groups excluded—women and minorities—are inherently inferior or are not entitled to equal professional opportunities. This Court has recognized that eliminating such discrimination serves a compelling state interest of the highest order.

To address invidious discrimination by "private" business clubs, the American Bar Association has recommended that legislative bodies, such as the New York City Council, develop objective standards to distinguish which private clubs within their respective jurisdiction are in fact business clubs. Legislative mandates are necessary because many business clubs will not adopt fair policies voluntarily. Objective standards ensure consistent enforcement and precise construction of the legislative will.

Local Law 63 properly sets forth objective standards necessary to address New York City's compelling interest in eliminating invidious discrimination by business clubs in New York City. Before adopting Local Law 63, the New York City Council held extensive hearings to determine the critical characteristics of private business clubs within New York City and developed objective standards to identify such clubs. The ABA testified in support of the fairness of Local Law 63 at those hearings and urges this Court to affirm the decision of the Court of Appeals of the State of New York that Local Law 63 is a constitutional solution to a substantial societal problem.

ARGUMENT

I. WIDESPREAD DISCRIMINATION EXISTS IN BUSINESS CLUBS AND PRESENTS A COMPELLING STATE INTEREST

A. Introduction

In recent years, this Court has evaluated and rejected constitutional challenges to the application of state anti-discrimination laws to various organizations. *See Board of Directors of Rotary Int'l v. Rotary Club*, 107 S. Ct. 1940 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). In rejecting the constitutional challenges, the Court emphasized the need to reconcile two legitimate, but competing, interests: the compelling state interest in eliminating invidious discrimination in marketplace forums, and the right of individuals to associate freely.

"Freedom of association" affords constitutional protection in two senses: (1) freedom from undue interference with one's choice of intimate associates; and (2) freedom to associate for the purpose of engaging in protected speech or religious activities. *Rotary Club*, 107 S. Ct. at 1945; *Jaycees*, 468 U.S. at 618. The right to discriminate in choosing intimate associates is not unlimited but applies primarily within family-type groups that "presuppose deep attachments and commitments." *Rotary Club*, 107 S. Ct. at 1946. As groups get larger and relationships become less intimate, the right to discriminate rapidly diminishes, giving way to the state's interest in prohibiting invidious discrimination. Further, the right to associate for expressive purposes is by no means absolute. *Jaycees*, 468 U.S. at 609. Rather, when posed against a compelling state interest such as the need to eliminate invidious discrimination, the right of expressive association will not be afforded constitutional protection. *See id.*

In *Jaycees* and *Rotary Club*, the Court held that applying the relevant state anti-discrimination law to the organization involved did not infringe unduly upon constitutional rights. There was no infringement of the right of intimate association because neither the Jaycees nor the Rotary Club even vaguely resembled a family-like group. Moreover, any impact that application of the particular State's anti-discrimination law had on expressive association rights was "justified because it serves the State's compelling interest in eliminating discrimination against women." *See Rotary Club*, 107 S. Ct. at 1947; *see also Jaycees*, 468 U.S. at 628.

Although existing legislation, such as that considered by the Court in *Jaycees* and *Rotary Club*, has gone a long way to rid society of invidious discrimination in public accommodations, one area where such discrimination persists on a significant scale is in so-called "private" business clubs addressed by Local Law 63. Members of these clubs pursue formal and informal business contacts and transactions in many, if not most, of the clubs on a constant basis. Nevertheless, the clubs are largely untouched by existing anti-discrimination laws.

In adopting Local Law 63, the City of New York properly addressed this problem of invidious discrimination, consistent with the constitutional norms set forth in *Jaycees* and *Rotary Club*. The law represents the City of New York's careful reconciliation of the City's compelling interest in eradicating invidious discrimination with individuals' freedom of association rights. In balancing these competing interests in Local Law 63, the City of New York confined the right to discriminate within its constitutional bounds, while allowing the legislature to fulfill its obligation to eliminate invidious discrimination by "private" business clubs that are really extensions of the public marketplace.

B. Many So-Called "Private" Clubs Are Centers Of Commercial Activity

In recent years, the extent of business and business-related activity that takes place at many so-called "private" clubs around the country has been well documented. This documentation reveals that equal access to business and professional opportunities for women and minorities depends upon equal access to these clubs.

One of the most thorough reviews of the problem was undertaken in hearings by the New York Commission on Human Rights in 1973. The report, based on testimony received by the Commission, concluded that:

[I]rrespective of the reasons, major companies, banks, law firms and trade and professional associations routinely use club facilities rather than public accommodation for meetings of all kinds formal and informal. This much was agreed by all witnesses. It is an accepted cliché of executive life that more is accomplished in club bars and dining rooms than in the office. The cliché applies to the informal and even chance meeting. But witnesses testified from personal experience that clubs are the preferred setting for scheduled group meetings ranging from the inner circle of a particular firm, to the leaders of industry, profession and government agency, to special events at which prominent persons address a select audience on matters of special or general current interest.⁵

Hearings held by the United States Senate Banking, Housing and Urban Affairs Committee in 1979 similarly revealed that formal and informal business transpired at these private clubs on a regular basis.⁶ For example, a

⁵ E. Lynton, *Behind Closed Doors: Discrimination by Private Clubs* 15 (May 1975) (report based on hearings held by the New York City Commission on Human Rights).

⁶ See, e.g., *Hearings Before the Comm. on Banking, Housing and Urban Affairs: Club Membership Practices of Financial Institutions*, 96th Cong., 1st Sess. 172 (1979).

survey of 1,591 banks and savings and loans conducted by the Committee in conjunction with the hearings revealed that 56% of the institutions regularly pay membership dues to the so-called "private clubs" and organizations.⁷

Testimony before the New York City Council Committee on Public Welfare in connection with Local Law 63 also led to the inescapable conclusion that these clubs serve a business function in New York City. Before adopting Local Law 63, the City Council considered extensive testimony that business people and professionals frequently use club facilities for luncheon or dinner business meetings with clients or colleagues.⁸ Various lawyers testified that luncheon meetings are regularly held at "private clubs" in the City of New York to discuss business.⁹ One lawyer testified that he has attended luncheon meetings at such New York City clubs on a monthly basis for over thirty years and the meetings have all been for business except on two occasions.¹⁰ Other evidence before the City Council showed that for one New York City club, food and beverage revenues from functions held at the club in 1979 amounted to \$1,072,200.00, a significant percentage of the total income of the club for that year.¹¹

⁷ *Id.* at 118.

⁸ See letter from Joann Whitehorn (December 12, 1983) ("Whitehorn Letter"); Schafran, *Private Clubs—Women Need not Apply*, *Foundation News* (Jan./Feb. 1982); and E. Lynton, *Behind Closed Doors: Discrimination by Private Clubs* (1975), attached as appendices to written testimony of Jack Greenberg, NAACP Legal Defense and Education Fund ("Greenberg Testimony"). All testimony considered by the City Council and referenced herein is a matter of public record.

⁹ See Whitehorn Letter, *supra* note 8; Greenberg Testimony, *supra* note 8.

¹⁰ See Greenberg Testimony, *supra* note 8.

¹¹ Letter from J. Wilson Newman (March 31, 1980), attached as appendix to Greenberg Testimony, *supra* note 8.

The City Council also considered detailed testimony that the dues and expenses for membership in the clubs are often paid for by the members' employers and that such dues and expenses often are characterized as ordinary and necessary business expenses and thus are tax deductible items for income tax purposes. See 26 U.S.C.A. § 162(a) (West Supp. 1987). For example, the National Club Association estimated that 37% of its members' dues are paid by businesses.¹²

Upon consideration of all the evidence, the City Council found that certain membership organizations with discriminatory practices are not "distinctly private" in nature but are places "where business deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed." Local Law 63, Section One, Legislative Declaration. The City Council found that the discriminatory practices thus constitute a "barrier to the advancement of women and minorities in the business and professional life of the City." *Id.*

Thus, the business function served by these nominally "private" clubs cannot be denied. As one commentator noted:

The economic and political importance of clubs is not lost on the hundreds of businesses, professional firms and banks that sponsor membership for key executives and promising employees, pay for their club charges . . . —[which include anything from] daily lunch bills to annual dues—and regularly use club facilities for entertaining clients and conducting meetings¹³

¹² Statement of Janet Studley on behalf of the ABA before the General Welfare Committee of the New York City Council (citing L. Shafran, *Welcome to the Club! (no women need apply), Removing Financial Support from Private Clubs that Discriminate Against Women* 1 (April 1981)).

¹³ Burns, *The Exclusion of Women from Influential Mens' Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 Harv. C.R.-C.L. L. Rev. 321, 328-329 (1983) (footnotes omitted).

Dues and expenses are paid by businesses and deducted from income tax for one reason: activities at the clubs promote business purposes. Nominally "private" business clubs act as extensions of their members' businesses, not as extensions of their homes.¹⁴

C. The Denial Of Equal Access To These Places Of Business Has A Profound Impact On Women And Minorities

Because substantial amounts of business and business-related activity occur at "private" clubs with discriminatory membership policies, the excluded groups—women and minorities—are denied full access to commercial and professional opportunities. As Judge Ruth Bader Ginsburg stated:

The attraction is not really the comfortable setting or the fine fare at the Century in New York, the Duquesne Club in Pittsburgh, the Metropolitan Club in Washington. Rather, these are places for informative exchanges with business or professional colleagues, meetings with clients or customers, settings where individuals seeking career-building opportunities can display their talents and be helped on their way. If women are not offered equal access, not treated as full members of the club, they are barred from a traditional avenue for self-development, economic and political opportunity and advancement.¹⁵

Indeed, the business disadvantages resulting from exclusion from these clubs cannot be denied. A woman or black who is not allowed to participate in the formal and informal business activities and to establish contacts at these clubs is in a weakened position relative to the male or white colleague who is allowed to participate. This

¹⁴ See *Cornelius v. Benevolent Protective Order of the Elks*, 382 F. Supp. 1182, 1204 (D. Conn. 1974).

¹⁵ Ginsburg, *Women as Full Members of the Club: An Evolving American Ideal*, 6 Human Rights 1, 19 (1977).

disadvantage is obvious, even to those who are not the objects of the discrimination. For example, Vern Atwaters, Chairman of the Board of New York City's Central Savings Bank, testified about the direct impact of exclusion before the United States Senate Banking, Housing and Urban Affairs Committee, stating:

I believe access to membership in private clubs does have a significant career and business value to the executive or professional, whether or not actual business or banking negotiations are conducted at the club. The opportunities for convenient and friendly association with clients, colleagues and prospects in a congenial setting is conducive to the establishing of longer term business relationships which may have future value to an individual's career or business.¹²

The harm to women and minorities caused by this competitive disadvantage multiplies as more women and minorities seek business and professional careers. In the legal profession, for example, there are now three times as many women as there were in the early 1970's. These women need greater access to professional opportunities, which includes more access to exclusive clubs where such opportunities are available. The denial of access to those clubs directly impairs the professional progress of female attorneys as well as the progress of countless other female and minority professionals.

The impact of club discrimination also extends beyond direct loss of specific business contacts and opportunities. Invidious discrimination by business clubs reinforces the negative image of women and minorities as inferior professionals. Denying women and minorities the opportunity to interact as equals in the club settings sends the clear message that they are not as "acceptable" as those permitted membership in the club and diminishes their

¹² *Hearings*, *supra* note 6, at 172.

standing in the eyes of colleagues and clients alike. The exacerbation by business clubs of this societal misconception of women and minorities as inferior perpetuates their inferior professional status.

As a result, those excluded from the clubs and society as a whole suffer because women and minorities are not allowed to reach their full professional potential. See *Jaycees*, 468 U.S. at 625. Indeed, this Court has recognized that a state's "historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order." *Id.* at 624.

II. LEGISLATIVE BODIES CAN BEST ADDRESS THIS COMPELLING STATE INTEREST IN ELIMINATING DISCRIMINATION BY ESTABLISHING REASONABLE, OBJECTIVE CRITERIA FOR DISTINGUISHING TRULY PRIVATE CLUBS FROM BUSINESS CLUBS

To eliminate invidious discrimination by business clubs that are only nominally "private," the ABA has recommended that legislative bodies, such as the City Council of New York, develop objective standards to distinguish which ostensibly "private" clubs within their respective jurisdictions are in fact business clubs.¹³ The detrimental effect of business club discrimination has been recognized by a number of public and private entities that have taken action to redress the problem.¹⁴ These actions are

¹³ The text of the ABA's Resolution recommending this action is set forth *supra* in the text accompanying note 2.

¹⁴ For example, after the Banking Committee hearings discussed previously, the Federal Institution Examination Council recommended that federal contractors not pay dues to private clubs that discriminate. See L. Schafran, *Welcome to the Club*, *supra* note 12. Similarly, during the Carter Administration, the Office of Federal Contract Compliance Progress issued regulations prohibiting fed-

commendable but are inadequate to address the problem. Many private business clubs remain staunchly opposed to implementing fundamentally fair policies voluntarily. Only legislative mandate will ensure that women and minorities attain equal access to the marketplace activities ongoing in business clubs.

Legislative bodies must enact pragmatic and objective standards to assure fair and equitable application of anti-discrimination laws such as Local Law 63. Without a clear, objective and uniform standard, courts have been forced to resort to an *ad hoc* approach. Indeed, without an objective standard, business-oriented clubs and even the courts may construe the term "private club" so broadly that invidious discrimination will continue to flourish.

In enacting Local Law 63, the City Council followed the ABA's recommended course of action. Prior to the Law's adoption, the New York City Council Committee on Public Welfare carefully considered detailed testimony, both for and against the proposed amendment.¹⁹ Based upon the evidence presented, the City devised objective and pragmatic standards to distinguish between "distinctly private" clubs and those clubs that are essentially centers of business and commercial activity.²⁰

oral contractors from paying employees' expenses, including dues, to discriminating clubs unless the contractor could demonstrate that the payments did not result in any business advantage to an individual. *Id.* at 11-12.

Many corporations including Transamerica Corporation, CBS, and Bank of America have adopted formal policies precluding the use of corporate funds to pay for business functions at these clubs or to reimburse employees' private clubs expenses. *Id.* at 14. Some state and local governments have taken similar actions, as have universities, law firms and other organizations, including the ABA. *Id.* at 14-16.

¹⁹ See *supra* at 9-10.

²⁰ The City of New York enacted Local Law 63 pursuant to the State of New York's constitutional "home rule" provision which

The City Council determined that one objective criterion for distinguishing between clubs that are truly "distinctly private" in nature and those that are centers of commercial activity is whether a club regularly provides meal services. Local Law 63, Section Nine. Another objective criterion for distinguishing between "distinctly private" clubs and clubs where business activity is prevalent is whether the club "regularly receives payment for dues, fees, uses of space, facilities, services, meals or beverages directly from or on behalf of non-members for the furtherance of trade or business." *Id.* The City Council further determined that if the club "has more than 400 members," this factor, in combination with the other criteria discussed above, is an appropriate indicator of whether a club in New York City is "distinctly private." *Id.* Four hundred members is a reasonable boundary, although a smaller number, such as the ABA recommended in supporting Introductory 513, or even a larger number, might have been appropriate. Even though a numerical boundary is "arbitrary" in one sense, it has the practical legislative advantage of being clear and definite.

Local Law 63 is consistent with the ABA's stated objective that the appropriate legislative body provide an adequate objective standard for identifying clubs that are not "distinctly private." In fact, the standards set forth in Local Law 63 are more rigorous and would bring fewer "private" business clubs within its purview than would the ABA's August 1983 resolution recommending

confers broad police power upon the City to take necessary action to promote the welfare of its citizens. See New York Constitution, art. IX, § 2(c). In adopting Local Law 63, the City properly exercised this grant of power in furtherance of the City's "compelling interest in providing its citizens . . . regardless of race, creed, color, national origin or sex . . . a fair and equal opportunity to participate in the business and professional life of the city." Local Law 63, Section One, Legislative Declaration.

amendment to the Civil Rights Act of 1964.²¹ That resolution proposed that a club should be considered a "public accommodation" if it derives a substantial portion of its income from business sources. Local Law 63, however, not only requires that the club regularly receive payment for dues, fees and other services "directly or indirectly from or on behalf of a non-member for the furtherance of trade or business," but the Law further requires that the club have more than 400 members *and* provide regular meal service in order to no longer qualify as a "distinctly private" club. Thus, Local Law 63 provides an objective standard that promotes consistency and ensures fair enforcement of the anti-discrimination laws.

Providing a clear, objective standard also protects individuals from the adverse consequences that can result when a private individual confronts the discriminatory practices of a large organization. The City Council heard testimony about such possible adverse effects by a female member of the Executive Committee of a Republican Party caucus. The woman was informed that, if she objected to attending luncheon meetings at a club that would not admit women as members, she could withdraw from committee membership. If the standards are clear and objective, such unfair choices would be posed to private individuals less frequently: in most cases, the government's mandate would require equal access to clubs hosting such events.

Finally, Local Law 63 is consistent with the principles enunciated by this Court in that it establishes specific and objective criteria that are "typically employed in determining the applicability of state and federal antidiscrimination statutes to the membership policies of assertedly private clubs" and that "ensure that the reach

²¹ The full text of the resolution is set forth in the text accompanying note 2.

of the . . . [Law] is readily ascertainable." *Jaycees*, 468 U.S. at 629-30.

The ABA recognizes the right of individuals to associate freely together in private social clubs for personal, social and political purposes and to choose friends or associates on any grounds regardless of their discriminatory nature. Local Law 63 is consistent with this right because it addresses only organizations that, according to reasonable, objective criteria, are business-related and professionally oriented and that provide opportunities for business or professional advancement. Moreover, as the New York City Council stated in the Legislative Declaration set forth in Section One of Local Law 63:

It is not the Council's purpose to dictate the manner in which certain private clubs conduct their activities or select their members, except insofar as is necessary to ensure that clubs do not automatically exclude persons from consideration for membership or enjoyment of club accommodations and facilities and the advantages and privileges of membership, on account of invidious discrimination. Nor is it the Council's purpose to interfere in club activities or subject club operations to scrutiny beyond what is necessary in good faith to enforce the human rights law.

Local Law 63 reflects the New York City Council's carefully reasoned determination of what is necessary to prevent invidious discrimination by "private" business clubs in New York City. The Law sets forth pragmatic and objective criteria consistent with constitutional norms and should be upheld.

CONCLUSION

The Court should affirm the determination of the court below that the criteria contained in Local Law 63 prescribe constitutionally sound standards for regulating the discriminatory membership policies of nominally "private" clubs.

Respectfully submitted,

ROBERT MACCRATE

President

American Bar Association

750 N. Lake Shore Drive

Chicago, Illinois 60611

(312) 988-5000

Counsel of Record

MICHAEL J. MADIGAN, P.C.

STARK RITCHIE

MICHELLE L. GILBERT

C. FAIRLEY SPILLMAN

JOHN M. COOK

Attorneys for the

American Bar Association as

Amicus Curiae

Dated: January 13, 1988

AMICUS CURIAE

BRIEF

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

NEW YORK STATE CLUB ASSOCIATION, INC.,

Appellant,

—v.—

THE CITY OF NEW YORK, THE MAYOR OF THE CITY OF NEW
YORK, THE CITY HUMAN RIGHTS COMMISSION and THE
MEMBERS OF THE CITY HUMAN RIGHTS COMMISSION,

Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

**BRIEF AMICI CURIAE OF THE STATES OF NEW
YORK, CALIFORNIA, NEW JERSEY, WISCONSIN,
MARYLAND, ILLINOIS, MICHIGAN, OREGON,
MASSACHUSETTS, MINNESOTA, WEST VIRGINIA
IN SUPPORT OF APPELLEES**

ROBERT ABRAMS
Attorney General of the
State of New York
120 Broadway, Suite 23-160
New York, New York 10271
(212) 341-2250

O. PETER SHERWOOD
Solicitor General
Counsel of Record

SUZANNE M. LYNN
ELVIA ROSALES ARRIOLA
Assistant Attorneys General
Of Counsel

(Additional Counsel Listed Inside Cover)

150

JOHN VAN DE KAMP
Attorney General of California
15 "K" Street
Sacramento, California 97814

W. CARY EDWARDS
Attorney General of New Jersey
Hughes Justice Complex CN 112
Trenton, New Jersey 08625

DONALD J. HANAWAY
Attorney General of Wisconsin
P.O. Box 7857
Madison, Wisconsin 53707-7857

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
Munsey Building
Calvert & Fayette Streets
Baltimore, Maryland 21202-1909

NEIL F. HARTIGAN
Attorney General of Illinois
500 S. 2d Street
Springfield, Illinois 62706

HUBERT H. HUMPHREY, III
Attorney General of Minnesota
515 Transportation Building
St. Paul, Minnesota 55155

DAVE FROHNMAYER
Attorney General of Oregon
Justice Building
Salem, Oregon 97310

JAMES M. SHANNON
Attorney General of Massachusetts
1 Ashburton Place
Boston, Massachusetts 02108

FRANK J. KELLEY
Attorney General of Michigan
1840 Michigan Plaza Building
1200 6th Street
Detroit, Michigan 48226

CHARLES BROWN
Attorney General of West Virginia
E 26 Capitol Building
Charleston, West Virginia 25305

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SUMMARY OF ARGUMENT

New York City Local Law 63 promotes government's compelling interest in eradicating invidious discrimination. The enactment of Local Law 63 followed an extensive inquiry by the New York City Council into the need to extend the City Human Rights Law's ban against discrimination by public accommodations to certain organizations claiming to be exempt "private clubs." The City Council concluded that several large and prominent institutions in the City catered to its members' needs to discuss and transact business in a social setting. The City Council also learned that membership in and use of these clubs' facilities were essential to the professional and career opportunities of many of its members, and that the dues and expenses for conducting business therein had become for many employers a normal business cost. *New York State Club Association ("NYSCA") v. City of New York*, 513 N.Y.S.2d 349, 350 (1987). Local Law 63 serves a compelling governmental interest in reaching those organizations whose activities have blurred the line between social and professional, thus forfeiting the right to be called private in any meaningful sense.

This Court has already determined on two occasions that state governments may extend the coverage of their anti-discrimination laws to organizations and institutions claiming to be private that deny membership on the basis of sex. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) "Roberts"; *Bd. of Directors, Rotary Int'l v. Rotary Club*, 107 S.Ct 1940 (1987) ["Rotary Club"]. Local Law 63 is a constitutional exercise of local police power under the criteria developed in *Roberts* and *Rotary Club*. Under Local Law 63 New York City considers such factors as size and selectivity of membership and the nature of a club's activities in determining whether it should be subject to the regulation under anti-discrimination laws. The criteria cited in Local Law 63 adequately protect those "highly intimate" associations that merit constitutional protection against the attempted application of a

state regulation. Even if Appellant NYSCA makes out a valid associational rights claim, the government's compelling interest in the eradication of invidious discrimination justifies Local Law 63's infringement on those rights.

ARGUMENT

THE CHALLENGED LAW STRIKES A PROPER BALANCE BETWEEN GOVERNMENT'S INTEREST IN ERADICATING DISCRIMINATION AND THE PROTECTION OF ASSOCIATIONAL FREEDOMS

Local Law 63 must be viewed against the backdrop of New York's anti-discrimination laws. Both the New York State Executive Law and the New York City Administrative Code prohibit invidious discrimination in places of public accommodation. N.Y. Exec. Law §§ 292, 296; N.Y.C. Admin. Code §§ B1-2.0, B1-5.0 and B1-7.0 ("State" and "City Human Rights Law"). Those legislative enactments provide illustrations of places that are considered public accommodations and both enactments exclude from their coverage, *inter alia*, those places that are "distinctly private." Neither law, however, until recently, has further defined or explained that term. *See e.g. United States Power Squadrons v. State Human Rights Appeal Board*, 59 N.Y.2d 401 (1984).

Local Law 63, enacted on October 24, 1986, amends the City's Human Rights Law to provide criteria for determining whether a place of accommodation is "distinctly private." That amendment provides, in part, as follows:

[a]n institution, club or place of accommodation shall not be considered in its nature distinctly private if it has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business.

Prior to enactment of the law, the City Council received testimony regarding the need for a bill like Local Law 63. Testimony taken by the Council supported its findings that certain membership organizations and clubs located in the City of New York, and elsewhere, are places that are not appropriately considered "distinctly private" due to the commercial nature of the activities transacted there. Testimony revealed that these places are meeting grounds for high level businessmen to discuss business and to develop valuable professional contacts for furthering their careers. The City was informed, among other things, that important business is conducted by members in such clubs, that membership is often vital to becoming an executive, and that many clubs serve as vital professional links to their members' future prosperity.² The City also learned that the dues and expenses for membership in these clubs are often paid for by the members' employers, either directly or indirectly through "tax-deductible" expense accounts.³ The commercial nature of the club's activities marked them not as "private" extensions of the home, but rather as public extensions of the office.

Based on the testimony presented New York City enacted Local Law 63. Reaffirming policies embodied in both the State and the City Human Rights Law, the City Council declared that assuring all City inhabitants equal and unfettered opportunity in the business and professional world is a compelling interest to the City of New York. The City Council cited the discriminatory practices in those places where members make important transactions and valuable contacts for business,

² See e.g., Written Testimony ("WT") of P. Omansky for Committee on Women's Rights, N.Y. County Lawyers' Assn., Hearings on Local Law 63 before New York City Council, Committee on General Welfare; WT of J. Avner for NOW Legal Defense and Education Fund; Oral Testimony ("OT") of M. Boepple for City University of New York at 2-8 (Dec. 22, 1983).

³ See e.g., WT and OT of L. Schafran for N.Y. City Commission on the Status of Women at 30-31 (Dec. 22, 1983); OT of J. Studley for American Bar Assn. at 20-21 (Dec. 22, 1983); WT of Jo-Ann Whitehorn for American Jewish Congress; OT of J. Greilsheimer for American Jewish Committee at 26-28 (Dec. 22, 1983).

employment or other professional purposes, as "barrier[s] to the advancement of women and minorities in the business and professional life of the city . . ." See Local Law 63, § 1, Legislative Declaration. Although the City Council recognized that many clubs may be formed for social, cultural, civic or similar purposes, it noted that the commercial nature of some of the clubs' activities and their prejudicial impact to minorities and women could not be ignored. *Id.* The City Council therefore identified large membership organizations with over 400 members which facilitate the discussion of business as not "distinctly private" and therefore not exempt from public accommodation anti-discrimination laws. *Id.*

Under principles enunciated by this Court, New York City has a compelling interest in eradicating discrimination against women and minorities which justifies any impact that the law may have on the associational freedoms of Appellant's members. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary International v. Rotary Club*, 107 S. Ct. 1940 (1987). The New York City Council found Local Law 63 to be necessary so that women and minorities would have access not only to tangible goods and services but also to the more intangible but equally significant advantages provided by membership in Appellant's clubs—business skills, contacts, professional advances. See *Roberts*, 468 U.S. at 625. Barred from such opportunities by exclusionary policies, women and minorities remain relegated to second class citizenship. To the extent that Local Law 63 may infringe upon the associational rights of Appellant's club members, that infringement is no greater than necessary to accomplish the City's overriding and compelling interest in eradicating discrimination.

In *Roberts*, this Court upheld against a First Amendment challenge a Minnesota statute that required the Jaycees to admit women as full members. In doing so, the Court analyzed the law's impact on two separate strands of the constitutional freedom of association—to enter into and maintain private, intimate relationships; and to associate for the purpose of

engaging in expressive and religious activities. *Roberts*, 468 U.S. at 617-18. Last term, in *Rotary Club*, 107 S.Ct at 1946, this Court re-affirmed the principles of *Roberts* stating that determining whether such a statute is constitutional requires a separate examination of the burdens imposed both on individuals' freedom of private association and their freedom of expressive association.

A. Local Law 63 Does Not Infringe on the Appellant's Rights to Private Association.

The privacy right, an indispensable aspect of personal liberty, has been held to protect "highly personal" associations, such as those involving the family. *Roberts*, 468 U.S. at 618-19. Thus, for example, decisions concerning marriage, *Loving v. Virginia*, 388 U.S. 1 (1967); contraception, *Carey v. Population Services International*, 431 U.S. 678 (1977); *Griswold v. Connecticut*, 381 U.S. 479 (1965); and cohabitation with relatives, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) have been held constitutionally protected. The exemption contained in Local Law 63 for "distinctly private" clubs is carefully designed to shield from state regulation those kinds of intimate associations and purely social relationships protected by the privacy guarantees of the United States Constitution.

1. Size in Membership

In rejecting a claim by the Jaycees that its privacy rights were implicated by application of the Minnesota state anti-discrimination laws, this Court found that the organization lacked the defining characteristics of truly private associations. The organization was large and unselective in its membership and the "maintenance of the association involve[d] the participation of strangers to that relationship." *Roberts*, 468 U.S. at 621. The Jaycees' 295,000 members and 7400 locals were found antithetical to the relative smallness that characterizes a truly intimate and private association. *Roberts*, 468 at 620-21. Similarly in *Rotary Club*, the Court viewed the local clubs' varying size between 20 and 900 members and the absence of an upper

limit on membership as encouraging inclusive rather than exclusive participation by members of the public in an organization's activities. Such factors are inimical to the formation of private intimate associations. *Rotary Club*, 107 S. Ct. at 1946.

In a similar fashion, under Local Law 63 a club is not considered distinctly private if it has over 400 members, it provides regular meal service, and it regularly receives payment for services from or on behalf of nonmembers in furtherance of their trade or business. New York City has reasonably concluded that a club having over 400 members engaging in extensive commercial activity affecting the public world of business cannot meaningfully be characterized as promoting the kind of "highly personal" relationship, *Roberts*, 468 U.S. at 609, which is exempt from government regulation.

2. Plan or Purpose of Exclusivity

The hallmark of the truly private club is that it is selective and exclusive. An organization whose activities are inclusive of non-members but are exclusive as to membership selection only on the basis of factors like race or sex has no legitimate "plan or purpose of exclusiveness" that makes it exempt from civil rights statutes. *Roberts*, 104 S. Ct. at 3251; *Tillman v. Wheaton-Haven Recreational Assoc.*, 410 U.S. 431, 438 (1973). Such arbitrariness in selectivity only accommodates personal prejudices. *United States Power Squadrons v. Human Rights Appeals Board*, 50 N.Y. 2d 2d 401, 412 (1983); *NYSCA v. City of New York*, 513 N.Y.S.2d 349, 353-354 (1987). In *Roberts*, the Jaycees' inability to prove that women were excluded under non sex-related criteria suggested that males were admitted on an unselective basis.

Local Law 63 applies only to organizations that regularly receive payment for services from non-members. Such organizations do not operate solely for the benefit and pleasure of their members. The regular provision of services and benefits to unidentified and unscreened members effectively vitiates the

role that selectivity in membership plays and subjects a club's membership policies to government regulation. *Rotary Club*, 107 S. Ct. 1946-1947 at 485; *United States Power Squadrons v. State Human Rights Appeal Board*, 59 N.Y. 2d 401, 402 (1983).

3. Public or Private Nature of Activities

On a spectrum from the most intimate relationship protected by the right of privacy, "to the most attenuated personal attachment," *Roberts*, 468 U.S. at 620, relationships surrounding the world of business have a lesser claim to constitutional protection from state regulation. Local Law 63 is designed only to reach the club that has interwoven the social function with the business transaction. An institution is not "distinctly private" if it regularly receives payment for services from non-members "in furtherance of trade or business." N.Y.C. Admin. Code § 8-107. This factor properly distinguishes the private, intimate association, see *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), from the fleeting social activity that facilitates business and is therefore subject to state regulation.

The boundaries of privacy may give way to public oversight when the activity central to forming the relationship involves "the participation of strangers." *Roberts*, 468 U.S. at 621; *Rotary Club*, 107 S. Ct. at 1946. The objective criteria in Local Law 63 are reasonably calculated to reach only those clubs that facilitate continuous activities cast with a "public interest." *NYSCA*, 513 N.Y.S. 2d at 354. Their purpose is to ensure that only "distinctly private" clubs be exempt under the City Human Rights Law. While it would be impossible to draw a precise line between all those clubs which are "distinctly private" and all those which are not, see *Roberts*, 468 U.S. at 620, Local Law 63 squarely aims at clubs which could not be said, in any meaningful sense, to be promoting the intimate and "highly personal" relationships protected by constitutional privacy guarantees.

B. Local Law 63 Does Not Violate the Appellant's Right to Expressive Association.

Freedom of association protects the rights of those who seek to join together to engage in First Amendment activities, e.g. speech, assembly and the exercise of religion. *Roberts*, 468 U.S. at 622; see *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965); *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958). These activities need not be political in order to come under the aegis of the First Amendment; they can be social, economic or cultural. *Roberts*, 468 U.S. at 622. The right of association "includes the right to express one's attitudes or philosophies by membership in a group . . ." *Griswold*, 381 U.S. at 483. Freedom of association, however, does not guarantee affirmative constitutional protection to the selection of club members on invidiously discriminatory grounds. "[T]he Constitution . . . places no value on discrimination . . ." *Norwood v. Harrison*, 413 U.S. 455, 469 (1973). See also *Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Runyon v. McCrary*, 427 U.S. 160 (1976); *United States Power Squadrons v. State Human Rights Appeal Board*, 59 N.Y.2d 401, 414 (1983).

Even assuming a valid associational right is implicated by the application of state and local anti-discrimination laws to certain clubs, it does not follow that Local Law 63 must fail. As this Court noted in *Roberts*, the right to associate for expressive purposes is not absolute. 468 U.S. at 623; see also *Rotary Club*, 107 S. Ct. at 1947. Governmental regulations infringing the right may be justified by a compelling purpose, unrelated to the suppression of ideas, if no less intrusive means of serving the end are available. *Id.*; *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (*per curiam*) (right of association may be infringed by state action necessary to further a compelling interest unrelated to the suppression of ideas).⁴

⁴ Appellant has not shown how any of the First Amendment activities engaged in by its members would be curtailed by the application of anti-discrimination laws, see *Roberts*, 468 U.S. at 626; *Hishon v. King & Spalding*, 467 U.S. at 78, nor indeed could it.

The public ends which Local Law 63 is designed to serve—ending discrimination and ensuring minorities and women equal access to the business world—are unquestionably compelling. See *NYSCA*, 513 N.Y.S.2d at 355. The City Council acted out of recognition of the lingering effects of discrimination that still operate to deprive many professional women and minorities equal access to the business leadership skills, contacts and employment opportunities available to the members of “private clubs.” *Rotary Club*, 107 S. Ct. at 1941-1942; *NYSCA*, 513 N.Y.S.2d at 355. It was precisely this concern this Court found compelling in *Roberts*, noting that the challenged statute:

. . . reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued disadvantaged groups

. . . .

468 U.S. at 626 (citations omitted).

Local Law 63 facilitates the government’s interest in opening the doors of many of New York City’s prominent business clubs to women and minorities. That compelling interest manifestly justifies any infringement of Appellant’s constitutional freedoms to privacy and expressive association, and the law has been carefully drawn to infringe on those rights as minimally as possible. *Id*; *NYSCA*, 513 N.Y.S. 2d at 355 (1987).

CONCLUSION

For the foregoing reasons, the judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
120 Broadway, Suite 23-160
New York, New York 10271
(212) 341-2250

O. PETER SHERWOOD
Solicitor General
Counsel of Record

SUZANNE M. LYNN
ELVIA ROSALES ARRIOLA
Assistant Attorneys General
of Counsel